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No. _____ 10-367

Supreme Court, U.S.
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In The
Supreme Court of the United States

ROLAND WALLACE BURRIS, U.S. SENATOR,

Petitioner,

v.

GERALD ANTHONY JUDGE, et al.,

Respondents.

On Petition For A Prejudgment Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Seventeenth Amendment's express delegation of the power to "direct" an election to fill a vacant seat in the United States Senate to state legislatures precludes a federal judge from selecting the candidates that shall appear on the ballot.

2. Whether the Seventeenth Amendment allows a state to forgo a special election and instead permit a temporarily appointed United States Senator to serve for the remainder of the vacated term where that term expires in less than 2 years after the first federal election following the vacancy.

3. Whether categorically excluding any would-be candidate from the ballot in a newly announced special election to fill a vacant seat in the United States Senate unless that individual had already registered and been certified by the Illinois State Board of Elections as a candidate for the regular November election is consistent with the First and Fourteenth Amendments.

PARTIES TO THE PROCEEDING

The petitioner is the Honorable Roland W. Burris, United States Senator, the defendant in the courts below. The respondents are Gerald Anthony Judge and David Kindler, the plaintiffs in the courts below, and Patrick J. Quinn, Governor of the State of Illinois and defendant in the courts below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Roland Wallace Burris, United States Senator respectfully petitions for a prejudgment writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion issued by the United States District Court for the Northern District of Illinois (Judge Grady, presiding) is unreported and is reprinted in the Appendix at C.

JURISDICTION

The district court entered its opinion on August 2, 2010. Senator Burris filed an appeal on August 4, 2010, a petition for a writ of mandamus, and an application for a stay in the United States Court of Appeals for the Seventh Circuit on September 3, 2010. That court denied the Stay Request and the Writ of Mandamus on September 8, 2010, and has not heard arguments on the appeal. Senator Burris filed an Emergency Application For A Stay Of Enforcement Of The Judgment Below Pending The Filing And Disposition Of A Petition For A Writ of Certiorari To The United States District Court For The Northern District Of Illinois on September 10, 2010 with this Court. This Petition for a Writ of Certiorari ensues. This Petition presents an issue of imperative public

importance, and thus the Court has jurisdiction under Rule 11 and 28 U.S.C. § 2101(e).

CONSTITUTIONAL PROVISIONS AND STATUTES

The Elections Clause of the United States Constitution provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of Chusing Senators.

U.S. Const., Article I, § 4, Clause 1.

The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble.

U.S. Const., Amend. I. The First Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652 (1925).

The Seventeenth Amendment to the United States Constitution provides in relevant part:

> When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of

> election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

U.S. Const., Amend. XVII.

STATEMENT

Absent swift intervention, Illinois citizens who cast a ballot in the November 2 special election to complete the last two months of President Barack Obama's vacated Senate term will earn the dubious distinction of becoming the first voters in the history of our federalist republic to elect a United States Senator from a pool of candidates selected by a member of the federal judiciary.

The Seventeenth Amendment expressly delegates to state legislatures the obligation to "direct" an election to fill a vacant seat in the United States Senate. Nonetheless, the judgment below effectively holds that federal courts are obligated under the Seventeenth Amendment to act in the stead of a state legislature if, by the calculation of the presiding judge, insufficient time remains for the legislature to act before the date of the special election. Such action fundamentally alters the allocation of power between federal and state governments.

This Court should grant review and decide the question of whether the Seventeenth Amendment

transfers the power to "direct" elections from state legislatures to federal courts in the event of a perceived shortage of time. The Court should also decide whether the Seventeenth Amendment permits Illinois to forgo a special election under these circumstances, and, if not, whether the permanent injunction nonetheless violates the First and Fourteenth Amendments. These issues are of pressing public importance. Each is prone to repetition, and capable of evading review. This Court should not allow a deviation of this magnitude to govern the election of a United States Senator without first considering the constitutional ramifications.

I. FACTUAL AND PROCEDURAL HISTORY

The week after winning the Presidential election, then-Senator Barack Obama informed then-Illinois Governor Rod Blagojevich that he would resign his position as the junior Senator from Illinois effective November 16, 2008. Governor Blagojevich promptly appointed Roland W. Burris to fill the vacancy. On January 15, 2009, Roland Burris became a member of the United States Senate. Senator Burris continues to serve the people of Illinois, and is prepared to do so for the remainder of the Obama term.

The Illinois legislature removed Blagojevich as Governor on January 29, 2009. Lt. Governor Pat Quinn assumed the Governorship that same day. Shortly thereafter, Gerald Judge and David Kindler, two Illinois registered voters, sued Governor Quinn in

the United States District Court for the Northern District of Illinois. Judge and Kindler alleged that the Illinois Election Code (particularly, 10 ILCS 5/Art. 25(8) violates the Seventeenth Amendment by obviating the need for the Governor to issue a writ of election when a senate vacancy occurs. 10 ILCS 5/Art. 25(8) reads:

> When a vacancy shall occur in the office of United States Senator from this state, the Governor shall make temporary appointment to fill such vacancy until the next election of representatives in Congress, at which time such vacancy shall be filled by election, and the senator so elected shall take office as soon thereafter as he shall receive his certificate of election.

Judge and Kindler urged the district court to grant a temporary injunction requiring Governor Quinn to "issue a writ for a special election to be conducted as soon as practical to fill the vacancy." The Governor filed a motion to dismiss, asserting that neither his refusal to issue a writ of election nor the Illinois statute requiring a single election to be held on November 2, 2010, violates the Seventeenth Amendment. Senator Burris submitted an amicus brief suggesting that the special election could only be held on November 2, 2010, Federal election day. Rather than consider Senator Burris a friend of the court, the district court ordered plaintiffs to amend their complaint naming Senator Burris as a defendant in the litigation.

On April 16, 2009, the district court "conclude[d] that § 25/8 does not violate plaintiffs' right under the Seventeenth Amendment to vote in the direct election of their Senator," and refused to grant a temporary injunction, ruling that the plaintiff's First Amended complaint failed to state a constitutional violation. See Appendix C. The district court granted the motion to dismiss without prejudice and invited the plaintiffs to amend the complaint by May 1, 2009.

Judge and Kindler filed an amended complaint. The plaintiffs also appealed the denial of the preliminary injunction to the United States Court of Appeals for the Seventh Circuit. On June 16, 2010, the court affirmed the district court's denial of the preliminary injunction, but issued a detailed advisory opinion on the underlying constitutional question. See Appendix D.

The appeals court interpreted the plaintiffs' "argument that Governor Quinn must issue a writ calling for an election to fill the senate vacancy on a date as soon as possible [to] encompass the claim that the governor must issue a writ of election." The court noted that Illinois disagrees that a special election must occur:

> In an opinion letter to leaders in the Illinois legislature, Illinois Attorney General Lisa Madigan wrote: "Under the current language of [10 ILCS 5/25-8], U.S. Senator Burris's temporary appointment will conclude in January 2011 following an election in November 2010, the next election of representatives in

> Congress." In addition, the Illinois State Board of Elections' current list of offices that will appear on the November 2, 2010, ballot in Illinois does not specify that there will be an election on that date to fill the balance of President Obama's senate term.

The appellate court declared that "[t]he governor has a duty to issue a writ of election to fill the Obama vacancy." It explained:

> the second paragraph of the Seventeenth Amendment establishes a rule for all circumstances: it imposes a duty on state executives to make sure that an election fills each vacancy; it obliges state legislatures to promulgate rules for vacancy elections; and it allows for temporary appointments until an election occurs. This demarcation of constitutional powers and duties between state executives and state legislatures advances the Seventeenth Amendment's primary objective of guaranteeing that senators are selected by the people of the states in popular elections.

The Seventh Circuit clarified that a single election to decide who shall serve as the junior Senator from Illinois in the 112th Congress would not suffice, explaining that the Governor must issue a writ in order to "announce to voters that there will be, in effect, two elections on that day – one to elect a replacement to fill the vacancy and one to elect a senator to the next Congress."

The Court of Appeals next addressed the question of how candidates should be chosen for the special election. Though the court technically refused to answer the question ("No one has raised, and we therefore do not address, the question how the state is to decide whose names should be on the November 2 ballot for the Obama vacancy"), it suggested: "The state might propose a solution acceptable to all parties (*e.g.*, using the candidates who have already qualified for the election for the 112th Congress), so long as that solution complies with Illinois and federal law." The court then noted that the district court had the power to direct the state to ensure that a special election complied with the Constitution:

> The district court has the power to order the state to take steps to bring its election procedures into compliance with rights guaranteed by the federal Constitution, even if the order requires the state to disregard provisions of state law that otherwise might ordinarily apply to cause delay or prevent action entirely . . . To the extent that Illinois law makes compliance with a provision of the federal Constitution difficult or impossible, it is Illinois law that must yield.

At no point did the Seventh Circuit declare that the federal court has the right to "direct" the mechanics of the vacancy election. Instead, the appeals court clearly felt that that power is vested in the Illinois General Assembly under the last sentence of the Seventeenth Amendment, which states "[t]hat the legislature of any State may empower the executive

thereof to make temporary appointments until the people fill the vacancies *by election as the legislature may direct*." (Emphasis supplied).

Ultimately, the appeals court decided not to overturn the district court's refusal to issue a preliminary injunction, finding: "There is still time for the governor to issue a writ of election that will call for an election on the date established by Illinois law and that will make it clear to the voters that they are selecting a replacement for Senator Obama. The district court can easily reach and resolve the merits of this request before any of the harm that the plaintiffs forecast comes to pass."

On June 21, 2010, Judge and Kindler filed a motion for a permanent injunction "mandating the defendant Governor to issue a writ setting date for an election to fill the vacancy in the United States Senate created by the resignation of Barack Obama on or about November 16, 2008 which seat is temporarily filled by Senator Burris."

Governor Quinn issued a writ of election after the decision in the Seventh Circuit but before the district court issued a permanent injunction. Both the special election and the regular election are set to take place on November 2, 2010. See Appendix E. The absentee ballots for both elections will be printed and mailed in advance of the election date.

On August 2, 2010, the United States District Court for the Northern District of Illinois (Judge Grady, presiding) issued a permanent injunction even

though Governor Quinn had already ordered a special election through his writ. See Appendix F. Instead, the district court used the injunction, one not requested by the plaintiffs, to define the mechanics of the special election. Despite the fact that the Seventeenth Amendment grants only the state legislature the power to "direct" an election to fill a vacant Senate seat, the district court found that it could unilaterally "formulate, as necessary, mechanisms for the conduct of a special election . . . " After refusing Senator Burris's request for full briefing on the issues, the district court proceeded to limit the field of candidates for the special election to those candidates who already had been added to the ballot for the regular election and to define other aspects of the special election.

To be clear, the Governor of Illinois had not yet issued a writ of election by the time the candidate field for the regular election had been cemented, and, in fact, the Governor challenged the plaintiffs' position that an election was necessary. Thus, no would-be candidate had notice that failure to register as a candidate for the regular election would forfeit the right to run in the entirely separate election to fill the Senate seat for the remainder of the Obama term.

Senator Burris did not register as a candidate for the regular election. Thus, the district court order prohibits Burris from running in the special election and deprives his supporters from voting for him to finish the remainder of the term in service to the people of Illinois as their junior Senator.

On August 4, 2010, Senator Burris filed a timely appeal, and on September 3, 2010 filed a petition for a writ of mandamus and a request for a stay in the Seventh Circuit. On September 8, 2010, the Seventh Circuit denied Senator Burris' Stay Request and Writ of Mandamus.

This Petition ensues.

REASONS FOR GRANTING THE WRIT

The judgment below divested the Illinois General Assembly of the power the Seventeenth Amendment expressly grants to state legislatures to direct the mechanics of an election to fill a vacant seat in the United States Senate, including the right to define the procedures by which candidates are to be selected to appear on the ballot. Moreover, the permanent injunction order issued by the district court conflicts with the decisions of this Court, as well as the First and Fourteenth Amendments, because it wholly eliminates the opportunity for any would-be candidate to run only to fill the vacant Senate seat (rather than for both the vacant seat and the subsequent six-year term), and deprives Illinois citizens of the rights to Due Process and Equal Protection, and to unfettered access to the ballot.

Election day is November 2nd -- less than sixty days away. Counsel for Petitioner is unable to locate a

single other instance in the history of the nation where a federal judge has completely sidestepped a state legislature and selected the candidates to appear in a congressional election. This should not be the first instance, certainly not without the Court's review.

Moreover, review is appropriate here because the district court issued a novel interpretation of the Seventeenth Amendment that appears to facially conflict with the text of that Amendment and the Court's interpretation thereof, and the permanent injunction issued by the district court is inconsistent with the First and Fourteenth Amendments.

I. THE DISTRICT COURT LACKED THE POWER TO SELECT CANDIDATES FOR THE SPECIAL ELECTION.

The Seventeenth Amendment explicitly vests the Illinois General Assembly with the power to dictate the mechanics of a vacancy election. The district court usurped this power by unilaterally selecting the candidates for the special election. This Court should vacate the injunction order.

The last sentence of the second paragraph of the Seventeenth Amendment provides that the person appointed by the state executive to fill a vacant Senate seat shall serve "until the people fill the vacancies by election as the legislature may direct." The power to "direct" elections (absent intervention

by Congress) is detailed in the Elections Clause contained in Article I, § 4, cl. 1 of the Constitution[1]:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of Chusing Senators.

The Court in *Newberry v. United States*, 256 U.S. 232, 252, 41 S.Ct. 469, 472, 65 L.Ed. 913 (1921), expressly held that the Seventeenth Amendment does not modify the power of legislatures and Congress to

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[1] See *Valenti v. Rockefeller*, 292 F. Supp. 851, 855-56 (W.D.N.Y. 1968) ("If the drafters of the Seventeenth Amendment had intended to bring about a radical departure from this normal rule of state discretion in the . . . manner of holding vacancy elections . . . it is likely that they would have employed clear language to that effect"); *Judge v. Quinn*, ___ F.3d ___, 2010 WL 2652204, at *11 (7th Cir. 2010) ("We note, before moving on, that the power of state legislatures to regulate elections to fill vacancies in the Senate is not established by the second paragraph of the Seventeenth Amendment alone. To the contrary, the Elections Clause in Article I, Section 4 of the Constitution instructs the states to prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," subject to Congress' power to override those regulations."); *id.* at *14 ("The phrase 'as the legislature may direct' affirms that the amendment was not intended to change the Elections Clause of the original Constitution, U.S. CONST. art. I, § 4, cl. 1; after all, the Seventeenth Amendment, as a later enactment, might have modified it. Under the Elections Clause, the states have 'broad power' to prescribe the procedural mechanisms for holding congressional elections.").

regulate the time, places, and manner of all congressional elections under the Elections Clause. Consistent with *Newberry*, this Court summarily affirmed the district court decision in *Valenti v. Rockefeller*, 292 F. Supp. 851, 856 (1968), which found that the power to regulate the "Time, Places, and Manner" of senatorial elections includes the right to prescribe the mechanisms by which candidates become eligible to be placed on the ballot. See *Valenti v. Rockefeller*, 393 U.S. 405 (1969), *affirming Valenti v. Rockefeller*, 292 F. Supp. 851 (W.D.N.Y. 1968) (noting that state legislatures enjoy a "reasonable degree of discretion concerning . . . *the procedures to be used in selecting candidates for such elections*.") (Emphasis supplied); see also *Trinsey v. Pennsylvania*, 941 F.2d 224 (3d Cir. 1991) (quoting *Valenti* and concluding: "The available precedent suggests that the Supreme Court views the manner in which the nominees are selected to have been left to the discretion of the states.").

Tellingly, the Seventh Circuit's extensive treatment of the issue on appeal from the original denial of a preliminary injunction did not even suggest that the district court take upon itself the task of selecting candidates for the special election. See *Judge v. Quinn*, ___ F.3d ___, 2010 WL 2652204, at *18 (7th Cir. 2010). ("[T]he question how *the state* is to decide whose names should be on the November 2 ballot for the Obama vacancy. *The state* might propose a solution acceptable to all parties . . . so long as that *solution complies with Illinois* and federal law.)

(Emphasis supplied). Not even the plaintiffs asked the district court to select the mechanism (much less the actual candidates) for selecting the special election candidates.[2]

The Court often confronts state legislatures that have overreached by enacting a regulation that undermines the right of citizens to associate, *Anderson v. Celebrezze*, 460 U.S. 780 (1983), or to be provided equal protection, *Bush v. Gore*, 531 U.S. 98 (2000). Similarly, the Court has invalidated actions of state legislatures that compile additional qualifications on the eligibility of particular candidates to be placed on the ballot. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). But this case is different altogether. The district court did not act here to rebuff actions of a state legislature that trespassed into the constitutional protections afforded to individual citizens; instead, the district court is the party who trespassed here, selecting candidates for a special election despite the constitution's express delegation of the power to do so to state legislatures.[3]

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[2] Plaintiffs' Motion for Permanent Injunction at p.6: "Further, the Court of Appeals raised a possible mechanism for selecting candidates for the election. [Citation omitted.] Plaintiffs would not object if the *State* selected that approach or any other reasonable approach that has been used under similar circumstances." (Emphasis supplied).

[3] See *U.S. Term Limits, Inc.*, 514 U.S. at 779 ("[T]he provisions governing elections reveal the Framers' understanding that powers over the election of federal officers had to be delegated to, rather than reserved by, the States. It is surely no

(Continued on following page)

This Court should grant review and respectfully consider a stay of the lower court's order to clarify that the Seventeenth Amendment exclusively vests the right to select the mechanism for selecting candidates in Senatorial elections with the state legislature (save pre-emptive action taken by Congress).

II. THE DECISION BELOW CONFLICTS WITH THE COURT'S SEVENTEENTH AMENDMENT JURISPRUDENCE.

The district court acted when no action was required by issuing a permanent injunction defining the mechanics of the special election. Plaintiffs' claims focused exclusively upon whether the Seventeenth Amendment required the Illinois governor to issue a writ of election to fill the Senate vacancy, never seeking any declarative or injunctive relief as to the electoral process itself. By the time the district court ordered the injunction, Governor Quinn had already issued a writ of election, as the district court points out, "because of the rulings of the Court of Appeals in this case requiring that the Governor issue a writ."[4]

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coincidence that the context of federal elections provides one of the few areas in which the Constitution expressly requires action by the States[.]").

[4] Permanent Injunction Order of August 2, 2010 by Honorable John F. Grady at para. 6. On appeal, the Seventh Circuit reviewed the district court's denial of plaintiffs' motion for a preliminary injunction, sustaining the order. However, in *dicta*,

(Continued on following page)

The Seventh Circuit advised only that the Seventeenth Amendment requires the Governor to fulfill his ministerial duty of issuing the writ of election. The district court extended the Seventh Circuit's dicta beyond the breaking point by ruling that the Seventeenth Amendment requires a special election to take place (even here, where only two months remain in the vacated term). The district court usurped the power of the State of Illinois to determine whether to hold a special election or to instead allow Burris to serve the remainder of the term. The decision below should be reversed so that Illinois can decide for itself whether a special election should be held, and, if so, dictate the mechanics of the election.

Of course, at this late date, it is possible the Illinois General Assembly will choose simply to forego the job of putting into place the mechanics of the special election. The judgment below sought to avoid that possibility – then more remote, as proved by the recent experience of West Virginia.[5] But no constitutional harm would accrue if this Court were to determine that no federal-judge-concocted special election took place.

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the appeals court concluded that the Seventeenth Amendment required Governor Quinn to issue a writ of election for the Senate vacancy. *Judge v. Quinn*, 2010 WL 2652204, at *15.

[5] When Senator Robert Byrd died on June 28, 2010, the West Virginia Legislature enacted legislation within three weeks to define election procedures for a special election to coincide with federal election day on November 2nd to fill the vacancy.

While the district court states that its order granting a permanent injunction is required given the short time-frame and the need to bring the election in line with the Seventeenth Amendment, the fact remains that the Seventeenth Amendment does not require a separate election at all under these circumstances. In fact, Colorado and Florida both will elect a new United States Senator this November 2 without holding a special election to fill the vacated seats for the remainder of the term. Instead, both states will allow the temporarily appointed Senator to remain in the Senate until the start of the 112th Congress. History supports this approach, as 27 of the 193 vacancies in the Senate from the ratification of the Seventeenth Amendment to the election of President Obama were filled by an appointee who served the remainder of the senate term in question without a special election to fill the vacancy.[6]

This application of the Seventeenth Amendment is consistent with the Court's prior interpretations of that provision. "In *Valenti v. Rockefeller*, 393 U.S. 405, 89 S.Ct. 689, 21 L.Ed.2d 635 (1969), the Court sustained the authority of the Governor of New York to fill a vacancy in the United States Senate by appointment pending the next regularly scheduled congressional election – in that case, a period of over

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[6] *Judge v. Quinn*, ___ F.3d ___, 2010 WL 2652204, *17 (7th Cir. 2010).

29 months."[7] Despite requiring a special election here, the Seventh Circuit conceded that the appointee in *Valenti* served the remainder of the term without a special election.[8].

Indeed, the Seventh Circuit in *Lynch v. Illinois State Board of Elections*, 682 F.2d 93, 96 (7th Cir. 1982), noted that this Court in *Rodriguez v. Popular Democratic Party* "expressly adopted the rationale of *Valenti*." The *Lynch* opinion quotes with favor this key passage from *Rodriguez*: "the fact that the Seventeenth Amendment permits a State, if it chooses, to forgo a special election in favor of a temporary appointment to the United States Senate suggests that a State is not constitutionally prohibited from exercising similar latitude with regard to vacancies in its own legislature."[9] The *Lynch* court went on to hold that *Valenti* and *Rodriguez* "sustain the authority to fill vacancies in elective offices by appointment, even though the appointee will hold office for the duration of the term."[10]

This approach makes imminent sense given that there will be only 62 days remaining in the 111th Congress following the November 2 election. By contrast,

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[7] *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 10-11, 102 S.Ct. 2194, 72 L.Ed.2d 628 (1982) (discussing the impact of the decision in *Valenti*).

[8] *Judge v. Quinn*, ___ F.3d ___, 2010 WL 2652204, n.2 (7th Cir. 2010).

[9] *Lynch*, 682 F.2d at 96.

[10] *Id.*

the judgment below cannot be reconciled with a plain reading of the Seventeenth Amendment, is contrary to the express wishes of the Governor of Illinois, may very well be contrary in substance to the wishes of the Illinois General Assembly, and has the negative side effect of perverting federal campaign limits by allowing the candidates to double federal contribution limits because there will be, in effect, two distinct federal elections of November 2. Ironically, the steps taken by the district court to ensure compliance with the Seventeenth Amendment seem only to guarantee that a constitutionally infirm election will take place in Illinois this November unless this Court acts.

III. THE DECISION BELOW IMPEDES THE RIGHTS OF ILLINOIS CITIZENS TO ASSOCIATE AND TO VOTE, AND DENIES THEM DUE PROCESS AND EQUAL PROTECTION.

Even if the Seventeenth Amendment did require Illinois to hold a special election *and* if the district court had the power to unilaterally select which candidates shall appear on the special election ballot, the permanent injunction issued by the district court nonetheless is inconsistent with the First and Fourteenth Amendments.

First, the procedure dictated by the district court does not comport with rudimentary principles of Due Process. The district court restricted access to the ballot based on whether a candidate already had

registered and been certified for the altogether separate general election to select the person who will serve the next six year Senate term. Importantly, the deadline for becoming a candidate for the regular election ballot had passed *before* the special election had been ordered, so would-be candidates who did not want to run in the regular election but did want to become a candidate for the term that expires at the end of the 111th Congress had no notice that failure to register for the regular election forfeited placement on the special election ballot. Indeed, when the time for registration passed, the State of Illinois, the district court, and the parties presumed that no special election would even take place.

In *Anderson*, the Court emphasized that the "primary concern is not the interest of [the] candidate, but rather, the interests of the voters who chose to associate together to express their support for [his] candidacy and the views he espoused." *Anderson*, 460 U.S. at 806. The district court order ignores the potential for divergent voter preferences in the two separate elections, and affirmatively disregards the mechanisms that Illinois already had in place for deciding the names to appear on the ballot.

The no-new-candidate approach taken by the district court discriminates against new candidates and the citizens that support them, and also interferes with "the right of individuals to associate for

the advancement of political beliefs."[11] The permanent injunction requires two separate elections on the same day. The candidates are listed on two distinct places on the ballot. Double the campaign contributions can be sought.[12] If Illinois must hold two elections, then rights of citizens to associate and vote effectively must be recognized in *each* election. This means that ballot access must be addressed separately for the special election.

Voters very well might have different preferences for what is desirable in a person who will fill the remaining 62 days of the current Senate term and the person who will fill the subsequent six-year term. Moreover, a candidate who matches the political preferences of a group of citizens in Illinois might be willing to run in the special election but not willing to

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[11] *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979).

[12] Campaign finance laws limit individual contributions to a candidate for election to federal office to $2,400. [While the limit for individual contributions is $2,000 under 2 U.S.C.A. § 441a(a)(1)(A), that figure is adjusted for inflation by 2 U.S.C.A. § 441a(c).] An "election" includes "a general, special, primary, or runoff election." [2 U.S.C.A. § 431(1)(A).] Because of the district court's injunction, two elections for the same Senate seat, a special and general election, will take place simultaneously. Thus, individuals can contribute twice as much to the same candidate for the same seat, contrary to the spirit of the campaign finance laws. This Court has recognized that statutory limits on direct contributions to candidates perform a "sufficiently important" governmental interest. *Buckley v. Valeo*, 424 U.S. 1, 25-26, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976); see *Citizens United v. FEC*, 558 U.S. 50, 130 S.Ct. 876, 901-903 (2010).

serve for the subsequent six years. And finally, many Illinois voters might prefer Senator Burris – who took on the obligation of Senator Obama's seat – to finish the job he signed up for, while respecting his well-founded view that he would not run for re-election. Failure to create a mechanism by which would-be candidates can run only in the special election deprives citizens with interests not met by the candidates in the regular election the opportunity to associate for political purposes and effectively vote for the candidate who matches their interests.

Similarly, the Democratic Party in Illinois might opt to choose a different candidate for the special and regular elections. After all, important legislation is set for the concluding session, and the Democratic Party of Illinois might wish to have the Senator who is already in Washington and well steeped in the pending issues to advocate for the people of Illinois without the need to brace for the inevitable rapid learning curve that comes with starting a new job in the United States Senate. More basic still, Illinois has selected a primary as the mechanism for selecting the nominee for each major party in each election.[13] The Court's jurisprudence allows states to opt to dispense with the traditional primary requirement, but does not allow a federal judge to order the state to dispense with their chosen mechanism for deciding the names that shall appear on the ballot.

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[13] 10 ILCS 5/Art. 7.

Of course, we are not dealing in abstractions here. In *Storer v. Brown*, 415 U.S. 724 (1974), the Court underscored the "proposition that the requirements for an independent's attaining a place on the general election ballot can be unconstitutionally severe." In *American Party of Texas v. White*, 415 U.S. 767 (1974), the Court upheld a state law that requires candidates to demonstrate a "significant modicum of support" before being placed on the ballot. Whatever the distance between restrictions that are too severe and state laws that require a "significant modicum of support," the district court here allowed *no* mechanism for qualifying for the special election ballot. Moreover, Senator Burris surely can meet any reasonable threshold for demonstrating public support.

In fact, Senator Burris was the first African American elected to statewide office in Illinois, becoming comptroller in 1978, and was elected to statewide office on three subsequent occasions. He was elected as the first African American Attorney General in the State of Illinois and the second African American to be elected to such office in the country. Senator Burris was also the first African American Vice Chairman of the Democratic National Party. Clearly, Senator Burris has shown public support and could do so in this instance. Thus, Senator Burris must (at a minimum) have some opportunity to qualify to be placed on the ballot. The permanent injunction order leaves him with none.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

July 22, 2010

Before

ILANA DIAMOND ROVNER, *Circuit Judge*
DIANE P. WOOD, *Circuit Judge*
JOHN DANIEL TINDER, *Circuit Judge*

No. 09-2219

GERALD A. JUDGE and DAVID KINDLER,

Plaintiffs-Appellants,

v.

PATRICK J. QUINN, Governor of the State of Illinois, and ROLAND W. BURRIS, U.S. Senator,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois

No. 09 C 1231

John F. Grady, *Judge.*

ORDER

On June 28, 2010, Defendant-Appellee Patrick J. Quinn filed a "Motion to Amend Opinion or, in the Alternative, Petition for Rehearing *En Banc*, of Defendant-Appellee Patrick J. Quinn, Governor of the State of Illinois." As ordered by the court, Plaintiffs-Appellants filed their response to that motion on July 7, 2010. The court construes the motion as a petition for rehearing or rehearing *en banc*.

On consideration of the petition, so understood, all of the judges on the original panel have voted to deny rehearing, and no judge in active service has requested a vote on the petition for rehearing *en banc*. It is therefore ORDERED that the petition for rehearing *en banc* is DENIED.

It is further ORDERED that the opinion of the court is revised as follows. On page 38, line 19, the following language is deleted:

> However Illinois conducts its election for the vacancy, the replacement senator presumably would present his or her credentials to the Senate and take office immediately, while the senator elected to begin service with the 112th Congress would not take office until January 3, 2011.

In its place, the following two new paragraphs are added:

> The district court has the power to order the state to take steps to bring its election procedures into compliance with rights guaranteed by the federal Constitution, even if the order requires the state to disregard provisions of state law that otherwise might ordinarily apply to cause delay or prevent action entirely. It is elementary that the Seventeenth Amendment's requirement that a state governor issue a writ of election to guarantee that a vacancy in the state's senate delegation is filled by an election is an aspect of the supreme law of the land. U.S. CONST. art VI, cl. 2. To the extent that

Illinois law makes compliance with a provision of the federal Constitution difficult or impossible, it is Illinois law that must yield. See *Rice v. Cayetano*, 528 U.S. 495 (2000) (holding that state-law rules governing elections of trustees to the Office of Hawaiian Affairs violated the Fifteenth Amendment); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (striking down state-law durational residency requirements as unconstitutional under the Fourteenth Amendment); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (holding that state-law poll taxes violated the Fourteenth Amendment).

However Illinois conducts its election for the vacancy, the state should endeavor to certify the results of that election as soon as possible, so that the replacement senator may present his or her credentials to the Senate and take office promptly. The senator elected to begin service with the 112th Congress will take office as the Constitution provides on January 3, 2011. U.S. CONST. amend. XX, sec. 1.

In all other respects, the petition for rehearing is DENIED.

In the
United States Court of Appeals
for the Seventh Circuit

No. 09-2219

GERALD A. JUDGE and DAVID KINDLER,

Plaintiffs-Appellants,

v.

PAT QUINN, Governor of the State of Illinois, and ROLAND W. BURRIS, U.S. Senator,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 09 C 1231 – **John F. Grady**, *Judge.*

Argued September 17, 2009 – Decided June 16, 2010

Before ROVNER, WOOD, and TINDER, *Circuit Judges.*

WOOD, *Circuit Judge.* Constitutional specialists and U.S. history buffs will recall that the original Constitution of 1787 took a cautious approach toward the election of public officials. It interposed the Electoral College between the voters and the President, U.S. CONST. art. II, § 1, and it provided that each state's two senators would be chosen by the state legislature, U.S. CONST. art. I, § 3. "Judges of the

supreme Court" were to be appointed by the President, "by and with the Advice and Consent of the Senate." U.S. CONST. art. II, § 2. Only the members of the House of Representatives were to be "chosen . . . by the People of the several States." U.S. CONST. art. I, § 2.

In 1913, the Seventeenth Amendment to the Constitution effected a fundamental change in the legislative branch of government by providing for the direct election of senators. The amendment also changed the rules for filling vacancies in a state's senatorial delegation. Under the original Constitution, the executive authority of the state could make a temporary appointment, which would last until the next meeting of the legislature. The Seventeenth Amendment modified that process, to reflect the fact that, in principle, senators were to be elected by the voters. The relevant language is as follows:

> When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided,* That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

U.S. CONST. amend. XVII para. 2. That passage may look straightforward, but this appeal has demonstrated that there is more to it than meets the eye. We must decide whether the system that Illinois is using to fill a famous vacancy in one of its senate

slots has strayed so far from the mark that a preliminary injunction should have been entered by the district court. We conclude that the district court did not abuse its discretion in refusing the requested injunction, and we therefore affirm its order.

I

A

Our case began after Barack Obama, then the junior senator from Illinois, won the presidential election on November 4, 2008. The next week, President-elect Obama wrote to Rod Blagojevich, then the governor of Illinois, announcing that the President-elect would resign his position in the U.S. Senate, effective November 16, 2008. Two years and 48 days remained in his six-year term at the time of his resignation. The President-elect's resignation created an immediate vacancy in one of Illinois's two senate seats. On December 31, 2008, then-Governor Blagojevich named Roland Burris, a former Attorney General of Illinois, to assume the Obama seat. A certificate of appointment signed by the governor said that the appointment was to last "until the vacancy . . . caused by the resignation of Barack Obama, is filled by election as provided by law." Mr. Burris took the oath of office on the Senate floor on January 15, 2009.

In the meantime, the Illinois House of Representatives voted to impeach Governor Blagojevich; it returned a wide-ranging article of impeachment

alleging that the governor had abused his powers, including his power to appoint a U.S. Senator. On January 29, 2009, the Illinois Senate convicted Governor Blagojevich and relieved him of duty. Lieutenant Governor Pat Quinn assumed the office of Governor of Illinois.

B

Upon Senator Burris's taking office, David Kindler and Gerald Judge, both registered voters in Illinois, sued Governor Quinn under 42 U.S.C. § 1983, alleging a violation of their rights guaranteed by the Seventeenth Amendment to the U.S. Constitution. The plaintiffs wanted the district court to declare the provisions in the Illinois Election Code for filling U.S. Senate vacancies unconstitutional and to issue an injunction requiring an election to select the person to complete the Obama term. In particular, they objected to the following part of the Illinois Election Code:

> When a vacancy shall occur in the office of United States Senator from this state, the Governor shall make temporary appointment to fill such vacancy until the next election of representatives in Congress, at which time such vacancy shall be filled by election, and the senator so elected shall take office as soon thereafter as he shall receive his certificate of election.

10 ILCS 5/25-8 (West 2010). According to this provision, the date for the election to fill the Obama vacancy is set for November 2, 2010. (Sixty-two days will

elapse between that day and the start of the 112th Congress on January 3, 2011.) The plaintiffs argued that this provision of the Illinois Election Code contravenes the second paragraph of the Seventeenth Amendment by allowing Senator Burris to serve as an appointee for an unreasonably long period of time and by saying nothing about Governor Quinn's duty to issue a writ of election. Governor Quinn's continuing failure to issue a writ of election (and Governor Blagojevich's failure to do so before him), they asserted, violated the same constitutional command. The primary relief that the plaintiffs originally requested was an injunction requiring Governor Quinn to "issue a writ for a special election to be conducted as soon as practical to fill the vacancy."

Their motion for a preliminary injunction asked the court to "order[ ] the Governor to comply with the Seventeenth Amendment by issuing a writ setting an election to fill the vacancy in the Senate seat, not in November, 2010, but at the earliest practical date." Governor Quinn responded with a motion to dismiss, in which he argued that neither his actions nor the Illinois Election Code violated the federal Constitution. Senator Burris submitted a brief in opposition to the complaint as well, at which point the district court concluded that he was a party that had to be joined under Federal Rule of Civil Procedure 19. The plaintiffs obliged and added him as a defendant.

At that point, the plaintiffs replied to both defendants' motions to dismiss. In this filing, which the district court construed as a reply brief for purposes

of the motion for a preliminary injunction, the plaintiffs advanced a new argument: the Illinois statute violated the Seventeenth Amendment because it denied the Illinois governor discretion to *decline* to make a temporary appointment to a vacant senate seat and to opt instead for an immediate election. In addition, the plaintiffs clarified that they were asking for an injunction "requiring the Governor to issue a writ setting a date for a special election to fill the vacancy in the Obama seat." But the details of their request shifted substantially: instead of pressing for an election at the earliest practical time, they now argued that the election should occur "on a reasonable, but relatively early date," or at a minimum, that "the Governor must be ordered to exercise his discretion by acting to set *some* date for a special election." (Emphasis added.)

On April 16, 2009, the district court granted the defendants' motions to dismiss and denied the plaintiffs' request for a preliminary injunction. The court refused to consider the challenge to the Illinois Election Code that the plaintiffs had introduced in their reply brief. It did, however, dismiss the case without prejudice, allowing the plaintiffs time to amend their complaint to present that claim properly. The plaintiffs did so, but they also appealed the district court's denial of their request for a preliminary injunction. *See* 28 U.S.C. § 1292(a)(1).

II

Before turning to the central questions on appeal, we must clarify what exactly is before us. Two of the claims that the plaintiffs have advanced are not. First is the argument that the plaintiffs raised for the first time in their reply brief, to the effect that the Illinois statute is unconstitutional because it requires the governor to make a temporary appointment when a senate vacancy arises, rather than "empowering" him to choose whether or not to make such an appointment. The district court was under no obligation to entertain this late submission, nor should we. *Spitz v. Tepfer*, 171 F.3d 443, 448 (7th Cir. 1999). Second is the initial contention that Governor Quinn is under an obligation to order an election to fill the vacancy that will take place as soon as possible. The plaintiffs' briefs disavow any argument relating to the timing of the election that they seek, and when we pressed them at oral argument, they explicitly abandoned this position.

More puzzling is whether we may consider the argument that the plaintiffs do make before this court. The plaintiffs take the position that Governor Quinn must issue a writ of election fixing *some* date for an election to fill Illinois's vacant senate seat, but they do not name a date on which that election should take place. Both sides agree that a writ of election must include a date on which the election in question will occur. But the defendants argue that the plaintiffs have waived the argument that a writ must issue regardless of the election date that it incorporates

because the plaintiffs did not develop the argument sufficiently before the district court. *E.g., Kunz v. DeFelice,* 538 F.3d 667, 681 (7th Cir. 2008).

In this instance, we conclude that the defendants are being too picky. The district court decided that the procedure prescribed by the Illinois Election Code was all that the Seventeenth Amendment required. It found that Illinois law calls for an election to fill the vacancy at the same time as the November 2, 2010, general election; Governor Blagojevich appointed Senator Burris to serve until an election took place, as provided by Illinois law; and the total duration of the vacancy – roughly two years, measured from Senator Obama's resignation until the November 2010 general election – was not unreasonable in light of *Valenti v. Rockefeller,* 292 F. Supp. 851 (W.D.N.Y. 1968), summarily aff'd, 393 U.S. 405 (1969) (*per curiam*). The district court concluded that because the plaintiffs could not show that the procedures set out in the Illinois statute violated their constitutional rights, they were not entitled to an injunction requiring Governor Quinn to issue a writ of election calling for a special election to take place prior to November 2010. The court found it unnecessary to decide whether the Seventeenth Amendment requires the governor to issue a writ of election, even if it names November 2, 2010, as the designated date.

We are satisfied that the plaintiffs have preserved their right to argue that a writ of election is constitutionally required. They presented this position both to the district court and in this court. Their

argument that Governor Quinn must issue a writ calling for an election to fill the senate vacancy on a date as soon as possible encompasses the claim that the governor must issue a writ of election. As they have asserted since the opening line of their first complaint in the district court, "This is an action . . . seeking to redress the ongoing violation of the Seventeenth Amendment . . . by the failure of defendant, as Governor of Illinois, to issue a writ for a special election to fill a vacancy in the United States Senate." Accordingly, we may consider whether the plaintiffs are entitled to a preliminary injunction ordering Governor Quinn to issue a writ of election calling for an election specifically to fill out the remainder of President Obama's term in the 111th Congress (rather than an election to choose the junior senator from Illinois for the 112th Congress).[1]

III

One more preliminary matter must be addressed before we turn to the main event: the defendants argue that the plaintiffs lack standing to pursue the injunctive relief that they seek. This is the case, the

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[1] Any senator who completes his or her full six-year term will serve in three Congresses. When Senator Obama first took office on January 3, 2005, he joined the 109th Congress; at the time he resigned in November 2008, the 110th Congress was in its final days; the 111th Congress began on January 3, 2009, and will end on January 3, 2011. Any claim concerning the seven-week Obama vacancy in the 110th Congress is now moot.

defendants say, because the only injury that the plaintiffs allege is the inability to hold the Illinois governor, rather than the state legislature, accountable for setting the date of the election for the vacancy. The defendants assert that this injury is not sufficiently concrete or specific to the plaintiffs to invoke the jurisdiction of the federal courts.

Article III of the Constitution limits federal judicial power to the resolution of cases and controversies. *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 597-98 (2007). Standing rules implement this limitation. *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 11-12 (2004). A plaintiff satisfies constitutional standing requirements by showing that the challenged action of the defendant caused an "injury in fact" that is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-62 (1992). The alleged injury must be concrete and particularized, and either actual or imminent. *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007).

The plaintiffs allege that Governor Quinn's failure to issue a writ of election will injure them because without a writ of election, an election to fill the senate vacancy left by President Obama will never take place – not on November 2, 2010, or any other date. The plaintiffs argue that, if things remain as they are now, Senator Burris will serve until the next Congress begins on January 3, 2011, at which time an entirely new term for one of Illinois's senators will begin. The State of Illinois appears to agree

that this will be the practical effect of the state's system. In an opinion letter to leaders in the Illinois legislature, Illinois Attorney General Lisa Madigan wrote: "Under the current language of [10 ILCS 5/25-8], U.S. Senator Burris's temporary appointment will conclude in January 2011 following an election in November 2010, the next election of representatives in Congress." Senatorial Vacancy under the Seventeenth Amendment, 2009 Op. Ill. Att'y Gen. No. 09-001, 2009 WL 530827 (Ill. A.G. Feb. 25, 2009). In addition, the Illinois State Board of Elections's current list of offices that will appear on the November 2, 2010, ballot in Illinois does not specify that there will be an election on that date to fill the balance of President Obama's senate term. *See* State of Illinois Candidate's Guide 2010, at i, available at http://www.elections.state.il.us/Downloads/ElectionInformation/PDF/2010Canguide.pdf (last visited June 15, 2010). This evidence suggests that without a writ of election calling for an election to fill the Obama vacancy, the plaintiffs will not have an opportunity to elect a replacement senator.

It is clear enough that the plaintiffs' alleged injury is traceable to Governor Quinn's conduct and would be redressed by a favorable decision. The district court, for example, could prevent the injury by granting an injunction requiring Governor Quinn to issue a writ of election to supply a replacement senator for the fast-waning Obama term, rather than for the new Congress. The more substantial issue is

whether the plaintiffs have identified an "injury in fact" that is sufficient for purposes of standing.

The essence of the plaintiffs' claim is their attempt to vindicate their right to vote for the replacement senator, rather than have someone appointed by either an executive or legislative actor. This is precisely what the Seventeenth Amendment is all about. The first paragraph says that the Senate "shall be composed of two Senators from each State, elected by the people thereof" and fixes the qualifications for electors participating in senatorial elections. U.S. CONST. amend. XVII para. 1. The second paragraph implements the general principle of the first for any vacancies that may arise. Initially, it seems to call exclusively for elections to fill vacancies, where it says that "the executive authority of [the] State shall issue writs of election to fill such vacancies." But then it adds a proviso permitting "temporary" appointments by the executive "until the people fill the vacancies by election as the legislature may direct." U.S. CONST. amend. XVII para. 2. The plaintiffs here believe that Illinois has exceeded whatever authority it may have under the proviso.

The Supreme Court has recognized that plaintiffs have standing to sue when they allege that state election procedures violate their right to vote under the Seventeenth Amendment. In *Gray v. Sanders*, which involved such a challenge to Georgia's primary-election laws, the Court emphasized the long-standing rule that "any person whose right to vote is impaired . . . has standing to sue." 372 U.S. 368, 375

& n.7 (1963) (citing *Baker v. Carr*, 369 U.S. 186, 204-08 (1962); *Smith v. Allwright*, 321 U.S. 649 (1944); *Ashby v. White*, (1703) 2 Ld. Raym. 938, 953-56 (K.B.)). In addition, *Valenti v. Rockefeller*, *supra*, a case summarily affirmed by the Supreme Court, concluded that "plaintiffs alleging that their right to vote to fill a Senate vacancy will be curtailed[ ] have sufficient standing to maintain this action." 292 F. Supp. at 853 n.1.

It is instructive to compare the procedures adopted in the Seventeenth Amendment to those in the original Constitution for filling vacancies in the House of Representatives. Article I, Section 2 says: "When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies." U.S. CONST. art. I, § 2, cl. 4. In *Jackson v. Ogilvie*, Illinois voters alleged that the governor had to issue a writ of election calling for an election to fill a vacant seat in the House, and this court upheld their standing to sue for a deprivation of their right to elected representation. 426 F.2d 1333, 1335 (7th Cir. 1970). We see no reason to treat the current plaintiffs' alleged injury differently. They assert that the governor's failure to issue a writ of election will deny them their right to vote under the Seventeenth Amendment, and their lawsuit represents an effort to prevent interference with that right. This is enough to establish that plaintiffs have been injured in fact and that they have a concrete stake in the outcome of the litigation. *See*, *e.g.*,

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 191 (2000).

This case does not present a "generalized grievance" so widely shared that the political process provides a more appropriate remedy for the plaintiffs. *See Federal Election Comm'n v. Akins*, 524 U.S. 11, 23-25 (1998); *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975). A voting rights claim strikes at the heart of the political process. Where a plaintiff's voting rights are curtailed, the injury is sufficiently concrete to count as an "injury in fact." *See, e.g., Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 331-32 (1999); *Akins*, 524 U.S. at 23-25; *Baker*, 369 U.S. at 207-08. In this case, the plaintiffs "are asserting 'a plain, direct and adequate interest in maintaining the effectiveness of their votes,' . . . not merely a claim of 'the right possessed by every citizen to require that the government be administered according to law.'" *Baker*, 369 U.S. at 208 (quoting *Coleman v. Miller*, 307 U.S. 433, 438 (1939), and *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922), respectively) (internal quotation marks omitted). Bearing in mind that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live," *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964), we conclude that the plaintiffs have alleged a concrete and specific injury that is neither conjectural nor hypothetical, and thus they may proceed with their action.

IV

We turn at last to the merits of the interlocutory appeal from the denial of injunctive relief. To justify a preliminary injunction, the plaintiffs must show that they are likely to succeed on the merits, that they are likely to suffer irreparable harm without the injunction, that the harm they would suffer is greater than the harm that the preliminary injunction would inflict on the defendants, and that the injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008); *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 625 (7th Cir. 2007). These considerations are interdependent: the greater the likelihood of success on the merits, the less net harm the injunction must prevent in order for preliminary relief to be warranted. *Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009). In this case, as in many, the primary reason why the court denied preliminary relief was its assessment of the plaintiffs' likelihood of success on the merits. Accordingly, we begin our discussion there, before turning to the other considerations.

As we noted earlier, the only question properly before us is whether the plaintiffs' assertion that Illinois's governor, by command of the Seventeenth Amendment, must issue a writ setting an election to fill the Obama vacancy is well taken. Implicit in this inquiry is a practical consideration: must Illinois law somehow assure that the date of such an election is set so that the vacancy is filled some time before the

commencement of the 112th Congress? In order to answer this question, we turn to the language of the Seventeenth Amendment, to decide whose reading – the plaintiffs' or the state's – is better founded.

A

Although we have already quoted the second paragraph of the Seventeenth Amendment in full, we set it out again here, identifying this time each of the critical phrases:

> [1] When vacancies happen in the representation of any State in the Senate, [2] the executive authority of such State shall issue writs of election to fill such vacancies: *Provided,* [3] That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election [4] as the legislature may direct.

U.S. CONST. amend. XVII para. 2. The first two phrases appear in what we will call "the principal clause," and the last two in what we will call "the proviso." In interpreting this text, we have taken care not to lose sight of the fact that the provisions for filling vacancies immediately follow the amendment's central command that henceforth the two senators from each state must be chosen by popular election.

1. The Principal Clause.

The first part of the principal clause states a condition: a vacancy must "happen" in "the representation of any State in the Senate." We need not tarry here, as there is no question that the President-elect's resignation on November 16, 2008, caused a vacancy to "happen."

The second part of the principal clause does two jobs: it delegates responsibility for addressing the vacancy to "the executive authority" of the affected state, and it tells the executive what to do – that is, to issue a writ of election and thereby assure that the replacement senator will, like the original one, be popularly elected. This clause uses the word "shall," which is normally understood as mandatory language. *See, e.g., Lopez v. Davis,* 531 U.S. 230, 241 (2001); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26, 35 (1998); *but see* BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 939-41 (2d ed. 1995) (discussing "words of authority" and arguing that "shall" is inherently ambiguous).

Reading the second part of the principal clause to impose a mandatory obligation on the state executive has the virtue of ensuring consistency between this provision and the counterpart language addressing vacancies in the House of Representatives. In this respect, the text of the Seventeenth Amendment is functionally identical to Article I, Section 2 of the Constitution, which governs elections to fill vacant seats in the House of Representatives. Compare U.S.

CONST. amend. XVII, with U.S. CONST. art. I, § 2, cl. 4. The drafting history of the Seventeenth Amendment reveals that this was no accident. Senator Joseph Bristow, who proposed the language that was approved by the 62nd Congress and ratified by the states as the Seventeenth Amendment, identified this similarity when he explained his proposed amendment to the Senate. 47 CONG. REC. 1482-83 (May 23, 1911). (Senator Bristow's comments are the only substantive discussion of the text of the Seventeenth Amendment's vacancy-filling provision in the legislative history of the amendment's passage in Congress.) In *Jackson v. Ogilvie, supra,* this court concluded that the language of the House vacancy-filling provision in Article I, Section 2 was "mandatory according to the ordinary meaning of its terms. . . . [I]t renders the issuing of the writs an indispensable duty." 426 F.2d at 1336 (internal citation and quotation marks omitted). Both Article I, Section 2 and part 2 of the Seventeenth Amendment's principal clause command the responsible state official to call an election in which the people can select a replacement senator or representative, should a vacancy arise. We read this language as a mandatory requirement in *Jackson v. Ogilvie,* and we see no reason to take a different approach here for purposes of the Seventeenth Amendment.

2. The Proviso.

If the Seventeenth Amendment ended with the principal clause, our task would be over. But it did

not. Instead, it added a proviso that permits temporary appointments to the Senate for the period before an election takes place. As the district court observed, the vacancy-filling provision in Article I, Section 2 "does not contain anything comparable to the Seventeenth Amendment's proviso." The House vacancy provision begins and ends with the imposition of a mandatory duty to call an election for the vacancy. We must therefore consider how the proviso interacts with the principal clause, and then look at the specific system that Illinois has adopted to fulfill its responsibilities.

a. Temporary Appointment Power. It should come as no surprise that the drafters of the Seventeenth Amendment contemplated a role for temporary appointments when senate seats were left unoccupied. A similar provision addressing vacancies in the Senate appears in the unamended Constitution. As originally ratified, the Constitution provided, "[I]f Vacancies happen [in the Senate] by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies." U.S. CONST. art. I, § 3, cl. 2. There was some concern during the 1787 Convention and at one state's ratifying convention that this executive appointment power was unwise and unnecessary. *See* 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 395 (J. Elliot ed., 1845) [hereinafter ELLIOT'S DEBATES] (remarks of James Wilson); 1 DEBATES IN THE SEVERAL STATE

CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 330 (J. Elliot ed., 2d ed. 1836) (declaration of New York upon the ratification of the Constitution). Proponents of executive appointment power prevailed, however, by arguing that appointments were "necessary, in order to prevent inconvenient chasms in the Senate," which would occur because state legislatures met infrequently. Such "chasms," they urged, might become problematic if they were to last too long, considering the great power of the Senate. 5 ELLIOT'S DEBATES 395 (remarks of Edmund Randolph). Moreover, the extra authority to ensure that vacancies in the Senate were filled promptly reflected the Constitution's broader concern that the states maintain equal representation in the Senate. *E.g.*, U.S. CONST. art. V ("[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate.").

The language of the Seventeenth Amendment's proviso follows the same pattern as the original executive appointment provision that the Framers placed in Article I, Section 3. Comparing the language of these two provisions in 1911, Senator Bristow concluded that the proviso "is practically the same provision which now exists in the case of such a vacancy." 47 CONG. REC. 1483 (May 23, 1911). The identity of language in the two provisions supports the idea that the drafters of the Seventeenth Amendment intended to preserve, through the executive appointment power, the states' ability to maintain their representation in the Senate until the

group charged with selecting a permanent replacement could exercise its constitutional role. Under both the original and the amended Constitution, the group charged with selecting a permanent replacement – whether the state legislature or the people – was the same one charged with selecting senators in the first place.

b. Contours of the Appointment Power. As we explained earlier, we need not, and do not, address several issues here that the plaintiffs either have not raised or have forfeited. We flag them now only for the purpose of clarifying what is included, and what excluded, from our present ruling. First, we have no occasion to say anything about the proviso's directive that the state legislature may "empower" the executive to make temporary appointments. This capacity to "empower" raises questions about the role of the state legislature compared to that of the state executive in the appointment process.

In addition, we do not have before us any properly presented question about how long a temporary appointment may last under the Seventeenth Amendment, nor the closely related question how much time can elapse between the start of a vacancy and an election to fill it. On the latter point, the parties have discussed the three-judge district court opinion in *Valenti v. Rockefeller, supra*, which considered whether a 29-month wait for an election to fill the vacancy left by the assassination of Senator Robert F. Kennedy violated the terms of the Seventeenth Amendment. 292 F. Supp. 851. That court

decided that the lapse in time did not offend the Seventeenth Amendment, and the Supreme Court summarily affirmed. When all is said and done, this leaves us without firm guidance from the Supreme Court.[2] *See Anderson v. Celebrezze*, 460 U.S. 780, 784-85 n.5 (1983) ("[T]he precedential effect of a summary affirmance extends no further than the precise issues presented and necessarily decided by those actions.") (internal quotation marks omitted).

As we noted, the plaintiffs have dropped their argument that Governor Quinn must issue a writ fixing the soonest possible date for a special election. They have pressed only the more modest claim that he has a duty to issue a writ of election that fixes a particular date for the election to fill the vacancy. *Valenti* had nothing to say about that issue. Indeed, *Valenti* could not have decided that question, because before the three-judge district court issued its opinion in the case, Governor Nelson Rockefeller made an appointment to Senator Kennedy's vacant seat and issued "a writ of election . . . for the November 1970 election to fill the vacancy for the remainder of the

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[2] The plaintiffs suggest that *Valenti* has no precedential force whatever because the Supreme Court summarily affirmed the district court's decision on grounds that the case was moot. We need not address this point, given our resolution of this case. They may, however, be overreaching, considering the fact that the Court itself has discussed aspects of *Valenti* in dicta. *See Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 10-11 (1982); *see also Lynch v. Illinois State Bd. of Elections*, 682 F.2d 93, 96-97 (7th Cir. 1982).

unexpired term (December 1, 1970, to January 3, 1971)." Motion on Behalf of Appellee to Dismiss or Affirm at 4, *Backer v. Rockefeller*, 393 U.S. 404 (1969) (No. 852) (companion case to *Valenti v. Rockefeller*, 393 U.S. 405 (1969) (No. 773)).

c. "As the legislature may direct." The proviso presents one final interpretive issue. The second paragraph, in art 4 as we have numbered it above, ends with the phrase "as the legislature may direct." We must decide which part of the amendment is modified by that phrase: the entire second paragraph, the entire proviso, or just the immediate antecedent of that final phrase.

It is relatively easy to dismiss the first of those possibilities. The grammatical acrobatics that would be necessary to read "as the legislature may direct" to modify the words "shall issue writs of election" are difficult to imagine. This would entail a conclusion that the phrase "as the legislature may direct" modifies everything in the entire paragraph – the power to issue writs of election, the power to make temporary appointments, and the power to schedule elections to fill vacancies. There is certainly nothing in the amendment that would warrant a restriction to one or more of those. The principal clause of the amendment designates the executive authority as the authorized actor, and the writ of election as the appropriate means for filling a vacancy. There is not a word about the state legislature, even though the Congress that drafted the amendment was consciously changing the system from one that was in the

hands of the legislature to a new one. We do not believe that the same Congress would have reintroduced the state legislature through such a back-door mechanism.

The plaintiffs suggest two readings, but both of their interpretations also create problems. The first one involves treating the final phrase as something that addresses the entire proviso – in particular, as authorization for the state legislature to regulate directly the duration of the executive's temporary appointment. But this approach creates a redundancy. It would require reading the proviso as saying "the legislature of any State may empower the executive thereof to make temporary appointments as the legislature may direct." Second, and somewhat closer to the mark, the plaintiffs suggest that the phrase modifies only the word "election" that immediately precedes it, but that somehow the timing of the election is excluded from the legislature's power. That would be interesting if there were some textual support for it, but there is none. We decline to read a limitation into the Seventeenth Amendment that is not there.

We conclude, therefore, that the phrase "as the legislature may direct" is best read as a straightforward modification of the directly preceding term "election." Any other construction upsets normal rules of English grammar, including the "'rule of the last antecedent,' according to which a limiting clause or phrase (here, ['as the legislature may direct']) should ordinarily be read as modifying only the noun or

phrase that it immediately follows (here, ['election'])." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (our modifications). Accordingly, in addition to establishing the rule that state legislatures may "empower" state executives to make temporary appointments when vacancies arise, the proviso gives the state legislature the power to direct the "election" in which "the people fill the vacanc[y]." We note, before moving on, that the power of state legislatures to regulate elections to fill vacancies in the Senate is not established by the second paragraph of the Seventeenth Amendment alone. To the contrary, the Elections Clause in Article I, Section 4 of the Constitution instructs the states to prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," subject to Congress's power to override those regulations. U.S. CONST. art. I, § 4, cl. 1. We return below to the importance of the Elections Clause to our understanding of the Seventeenth Amendment's vacancy-filling provision.

3. The Proviso's Relationship with the Principal Clause.

Next, we must consider how the authorization in the proviso for temporary, executive appointments to the Senate interacts with the principal clause's language indicating that the executive's job is simply to issue writs of election enabling the people to fill senate vacancies. The first issue is whether the proviso is better read as an alternative to the mandate set out in the principal clause, or as an elaboration on the

process described in that clause. If it offers an alternative, then there is no doubt that the Illinois General Assembly has exercised its authority in this respect. If it is an elaboration, then we must decide how to reconcile the fact that the proviso authorizes the state legislature to "direct" the details of the election for the vacancy, while the principal clause requires the executive to issue a writ of election, which is a document that normally would specify the date on which the election in question will take place.

a. Alternative or Elaboration? The defendants would like us to rule that the principal clause and proviso are "two distinct paths to fill a Senate vacancy." They take the position that when a state legislature (exercising its power under the proviso) empowers the governor to make a temporary appointment and provides for an election, the legislature supplants any role that the executive, the principal clause, or the writ of election might have played. The plaintiffs, on the other hand, argue that the proviso has no bearing on the duty mandated by the principal clause. They view the proviso as a supplemental procedure that does nothing more than permit the state legislature to empower the governor to make a temporary appointment until a vacancy election occurs.

While courts have long recognized that "[t]he general office of a proviso is to except something from the enacting clause, or to qualify and restrain its generality," *United States v. Morrow*, 266 U.S. 531, 534 (1925), "its general (and perhaps appropriate)

office is not, alas, its exclusive use," *Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2190 (2009). In some situations, a proviso will "'state a general, independent rule.'" *Id.* (quoting *Alaska v. United States*, 545 U.S. 75, 106 (2005)). To identify how the proviso in the Seventeenth Amendment functions, it is best to begin by reading the second paragraph as a whole, giving the language "such construction as will permit both the enacting clause and the proviso to stand and be construed together with a view to carry into effect the whole purpose of the law." *American Airlines, Inc. v. Civil Aeronautics Bd.*, 178 F.2d 903, 906-07 (7th Cir. 1949) (quoting *White v. United States*, 191 U.S. 545, 551 (1903)).

The most natural reading of the second paragraph, in our view, leads to the conclusion that the proviso qualifies the principal clause; it does not provide a freestanding alternative. The drafting and ratification history of the amendment supports this interpretation. *See, e.g.*, 47 CONG. REC. 1483 (May 23, 1911) (Senator Bristow, during the debates in Congress over the Seventeenth Amendment, remarked, "My amendment provides [in the proviso] that the legislature may empower the governor of the State to appoint a Senator to fill a vacancy until the election occurs, *and* he is directed by this amendment [in the principal clause] to 'issue writs of election to fill such vacancies.'") (emphasis added); 2 JOHN BOUVIER, A LAW DICTIONARY 483 (15th ed. 1891) ("A proviso differs from an exception. . . . An exception *exempts*, absolutely, from the operation of an engagement or

an enactment; a proviso defeats their operation, *conditionally*."). The principal clause describes a chain of events: when a vacancy happens, the state executive issues a writ of election, which calls for an election in which the people will fill the vacancy. The proviso qualifies this chain of events by permitting an appointee to intercede temporarily between the start of the vacancy and the election that permanently fills that vacancy.

b. Reconciling the Proviso and the Principal Clause. Once we understand the proviso as a qualification of, rather than an alternative to, the principal clause, we must consider how the command that the state executive "shall issue writs of election to fill . . . vacancies" in the principal clause coexists with the proviso's authorization for vacancy elections to take place "as the legislature may direct." By its reference to the writ of election, the principal clause invokes a well-established mechanism for ensuring that elections take place. The proviso's statement that the "legislature may direct" vacancy elections calls to mind the role of the state legislatures under the Elections Clause of the Constitution. Once these background principles are understood, the two clauses of the Seventeenth Amendment's vacancy-filling provision are easily reconciled.

i. *The Principal Clause and Writs of Election.* While the writ of election is less famous than the other writ mentioned in the Constitution, U.S. CONST. art. I, § 9, cl. 2 (the "Writ of Habeas Corpus"), it too has a well-established role. The writ of election had

long been a predicate to English parliamentary elections. *See, e.g.*, 2 THE CORRESPONDENCE OF HENRY HYDE, EARL OF CLARENDON 226 n.* (Samuel Weller Singer ed., 1828) (quoting 3 F.A.J. MAZURE, HISTOIRE DE LA RÉVOLUTION DE 1688, EN ANGLETERRE 264-65 (1825)) (explaining that King James II attempted to prevent parliamentary elections during the Glorious Revolution by withholding the writ). As the power of the monarch subsided over time, issuance of the writ of election became an increasingly ministerial duty. Still, even today, the writ triggers elections in Britain. *See* Representation of the People Act, 1983, c. 2, § 23 & sched. 1, pt. 1, § 1.

The role of the writ of election is also apparent in the history of American elections. From the start, the U.S. Constitution has included the requirement that state executives "issue Writs of Election" whenever there is a vacancy in the House. U.S. CONST. art. I, § 2, cl. 4. The Framers naturally would have viewed the writ as the proper device for initiating an election because the state constitutions referred to writs of election as the exclusive mechanism for filling vacant elected offices. *See, e.g.*, ILL. CONST. of 1818, art. II, § 11; *see also* DEL. CONST. of 1776, art. 5; GA. CONST. of 1777, art. VII; N.C. CONST. of 1776, art. X; The Northwest Ordinance para. 10, July 13, 1787, 1 Stat. 51 (1789). At the time that the states ratified the Seventeenth Amendment, many states' laws required state executives to issue writs of election to fill vacancies in elected offices. In Illinois, for example, writs of election were required to call vacancy elections for

every county and statewide office, as well as the office of U.S. Representative. *See* ILL. CONST. of 1870, art. IV, § 2; An Act in Regard to Elections, and to Provide for Filling Vacancies in Elective Offices, 1871-72 Ill. Laws, at 400-01, §§ 127-133. Today, the writ of election retains its essential place in state election procedure. *See* 10 ILCS 5/2A-4 (West 2010); 10 ILCS 5/2A-9(a-5) (West 2010); 10 ILCS 5/25-4 (West 2010); 10 ILCS 5/25-7 (West 2010); *see also*, *e.g.*, FLA. STAT. ANN. § 100.161 (West 2008); R.I. GEN. LAWS § 17-4-9 (2003); WASH. REV. CODE ANN. § 29A.28.041(2) (West Supp. 2010).

Importantly, at the time that the Seventeenth Amendment was drafted, it was settled that the state executive's power to issue a writ of election carried with it the power to establish the time for holding an election, but only if the time had not already been fixed by law. *See* GEORGE W. MCCRARY, A TREATISE ON THE AMERICAN LAW OF ELECTIONS 166 (2d ed. 1880); Case XXIII, John Hoge of Pennsylvania, Committee of Elections, 8th Cong. (1804), reprinted in CASES OF CONTESTED ELECTIONS IN CONGRESS, FROM THE YEAR 1789 TO 1834, at 135 (M. St. Clair Clarke & David A. Hall eds., 1834). Even when the time of a vacancy election is fixed by law, however, the writ plays the important administrative role of authorizing state officials to provide for the myriad details necessary for holding an election (printing ballots, locating voting places, securing election personnel, and so on).

ii. *The Proviso and the Elections Clause.* The notion that state legislatures play an essential role in

promulgating the law that governs congressional elections also has deep roots. There is now a body of federal law that concerns congressional elections, *e.g.*, 2 U.S.C. §§ 1-9, but the states continue to control many aspects of federal elections. This is consistent with the proviso in the Seventeenth Amendment. The phrase "as the legislature may direct" affirms that the amendment was not intended to change the Elections Clause of the original Constitution, U.S. CONST. art. I, § 4, cl. 1; after all, the Seventeenth Amendment, as a later enactment, might have modified it. Under the Elections Clause, the states have "'broad power' to prescribe the procedural mechanisms for holding congressional elections," *Cook v. Gralike,* 531 U.S. 510, 523 (2001) (quoting *Tashjian v. Republican Party of Connecticut,* 479 U.S. 208, 217 (1986)), limited only by Congress's power to "make or alter such Regulations," U.S. CONST. art. I, § 4, cl. 1; *Buckley v. Valeo,* 424 U.S. 1, 131-32 & n.174 (1976). But the Elections Clause does not just empower; it "expressly requires action by the States" when it comes to regulations for congressional elections. *U.S. Term Limits v. Thornton,* 514 U.S. 779, 804-05 (1995); accord *id.* at 862-63, 115 S. Ct. 1842 (Thomas, J., dissenting).

The balance between the states' power and that of Congress to regulate congressional elections was a substantial issue when the Constitution was being drafted, *see* 5 ELLIOT'S DEBATES 401-02; THE FEDERALIST No. 59 (Hamilton), and it remained a contentious topic more than a century later as the Seventeenth

Amendment worked its way through Congress. In fact, with the exception of the principal question whether the people should directly elect senators, no issue was more hotly debated than whether the states should control senatorial elections exclusively or Congress should retain a role.[3] In all of the legislative

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[3] In both the 61st Congress, where the Senate narrowly defeated a proposed amendment, and the 62nd Congress, which ultimately passed the amendment, the debate over federal control of senatorial elections commanded significant attention. See, *e.g.*, 46 CONG. REC. 847-48 (Jan. 13, 1911) (Sen. Sutherland); *id.* at 1161-69 (Jan. 20, 1911); *id.* at 1335-39 (Jan. 24, 1911) (Sen. Depew); *id.* at 2426-27 (Feb. 13, 1911) (Sen. Curtis); *id.* at 2491-98 (Feb. 14, 1911) (Sens. Bourne and Brown); *id.* at 2645-57 (Feb. 16, 1911) (debate between Sens. Sutherland and Borah); *id.* at 2756-63 (Feb. 17, 1911) (Sen. Rayner); *id.* at 3307 (Feb. 24, 1911) (Senate approves amendment retaining federal oversight of senatorial elections); 47 CONG. REC. 203-43 (Apr. 13, 1911) (House debate on proposed amendment); *id.* at 1482-90 (May 23, 1911) (Senate debate on Sen. Bristow's proposal); *id.* at 1879-1925 (June 12, 1911) (Senate debate on proposed amendment); *id.* at 1884-1924 (June 12, 1911) (Sen. Bacon's opposition to federal control); 48 CONG. REC. 6347-69 (May 13, 1912) (passage of proposed amendment through Congress). *See generally* JOSEPH L. BRISTOW, RESOLUTION FOR THE DIRECT ELECTION OF SENATORS, S. DOC. NO. 62-666, at 7-8 (1912); 1 GEORGE H. HAYNES, THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE 106-115 (1938); 1 ROBERT C. BYRD, THE SENATE, 1789-1989: ADDRESSES ON THE HISTORY OF THE UNITED STATES SENATE, S. DOC. NO. 100-20, at 389-406 (1988). The question of federal control over senatorial elections left the Senate evenly divided, and it took the vote of Vice President James Sherman to decide the question in favor of retaining a role for federal oversight. *See* 47 CONG. REC. 1923 (June 12, 1911). The issue kept the proposed amendment tied up in a Conference Committee of the House and Senate for nearly a

(Continued on following page)

history related to the passage of the Seventeenth Amendment, however, no member of Congress ever expressed doubt that state legislatures were the central actors when it came to passing laws that governed the election of senators.

The plaintiffs are correct that neither the proviso of the Seventeenth Amendment nor the Elections Clause overrides the duty of the state's executive to issue a writ of election when a vacancy occurs. It does not necessarily follow, however, that the executive's power to issue a writ of election includes the power to select any election date whatsoever. What is clear is that traditional writs of election always include a date. At the same time, the state legislature may pass laws that establish a range of dates from which the state executive may choose, and might even limit that set to a single day. In this way, the state executive's duty to issue a writ of election that includes a date for the election is constrained by, but not replaced by, the state legislature's obligation to direct elections to fill vacancies.

A recent example from Illinois illustrates this division of power. When Representative Rahm Emanuel resigned his seat in the House of Representatives on January 2, 2009, to become President Obama's Chief of Staff, he left a vacancy. Governor Blagojevich then issued a writ of election commanding the clerk of the

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year. *Senators by Direct Vote Passes House*, N.Y. TIMES, May 14, 1912, at 1.

county encompassing the affected congressional district "to cause a SPECIAL ELECTION to fill such vacancy . . . on TUESDAY, April 7, 2009." The Illinois law that governs vacancies in the House provides a range of dates within which a vacancy election must occur, and Governor Blagojevich's writ of election incorporated a date within that range. *See* 10 ILCS 5/25-7 (requiring the Illinois governor, under these circumstances, to choose a day "within 115 days"). This reflects a common pattern. *See, e.g.*, MASS. ANN. LAWS ch. 54, § 140(a) (LexisNexis Supp. 2010) (effective Dec. 23, 2009) (requiring the governor, in some circumstances, to issue precepts fixing a date for a vacancy election between 145 and 160 days after the vacancy occurs); WASH. REV. CODE ANN. § 29A.28.041(2) (giving the executive discretion, in some circumstances, to pick any date for the vacancy election more than 90 days later than the date that the writ issues).

Read as a whole, therefore, the second paragraph of the Seventeenth Amendment sets up a system under which the principal clause and proviso assign complementary roles to the state's executive and legislative authorities in the process of filling senate vacancies. Nothing about the state legislature's power to direct the election to fill a vacancy qualifies or nullifies the executive's duty to issue writs of election.

4. Filling Vacancies under the Seventeenth Amendment.

To summarize, the vacancy-filling provision in the second paragraph of the Seventeenth Amendment imposes two requirements. First, every time that a vacancy happens in the state's senate delegation, the state must hold an election in which the people elect a permanent replacement to fill the vacant seat. Second, the executive officer of the state must issue a writ of election that includes a date for such an election to take place. Whether the vacancy is first filled by a temporary appointee, as permitted by the proviso, is a matter left up to the state and is governed by state law. The temporary appointment ends when the people fill the vacancy in an election.

State law controls the timing and other procedural aspects of vacancy elections. The Elections Clause obliges the states to make these rules, and the final phrase of the Seventeenth Amendment's second paragraph reaffirms this role. The state legislature's power to make laws governing vacancy elections is limited by Congress's power under the Elections Clause to "make or alter" such regulations. To the extent that the plaintiffs argue that the governor must be able to select a date for the vacancy election of his own choosing, they are incorrect. The amendment does not disturb the power of the state legislature to confine the governor's discretion in selecting a date.

If the state legislature has exercised that power, then the state executive must name a date consistent with the state's law in the writ of election. In such a circumstance, the writ still has a critical role: it announces to the voters the time and place of the election; it sees that the electoral machinery is engaged; and it guarantees that an election for the vacancy will actually take place on the date directed. Where state law leaves room for executive discretion (as was the case when Representative Emanuel resigned), the executive may select a date within the authorized range. As a result, the defendants' position that the duty of setting a date for the vacancy election is entirely the prerogative of the state legislature is somewhat misleading. If the state legislature leaves a measure of discretion over the timing of a vacancy election to the state executive, the state executive may exercise that discretion.

So understood, the second paragraph of the Seventeenth Amendment establishes a rule for all circumstances: it imposes a duty on state executives to make sure that an election fills each vacancy; it obliges state legislatures to promulgate rules for vacancy elections; and it allows for temporary appointments until an election occurs. This demarcation of constitutional powers and duties between state executives and state legislatures advances the Seventeenth Amendment's primary objective of guaranteeing that senators are selected by the people of the states in popular elections.

B

This rather extended look at the underlying merits of the plaintiffs' claim has been necessary in order to evaluate their likelihood of success, as it bears on the district court's decision not to grant a preliminary injunction. As the case now stands, the plaintiffs take the position that the Seventeenth Amendment requires Governor Quinn to issue a writ of election calling an election to fill President Obama's vacancy in the Senate, and the state is arguing that he is under no such obligation. Our analysis of the Seventeenth Amendment convinces us that the plaintiffs have shown a strong likelihood of success on the merits. The governor has a duty to issue a writ of election to fill the Obama vacancy. That writ must include a date, but it appears that the Illinois legislature has provided only one date from which Governor Quinn may choose: November 2, 2010.

The plaintiffs would like us to rule that the provision of the Illinois Election Code governing senate vacancies, 10 ILCS 5/25-8, is unconstitutional because it *prevents* Governor Quinn from choosing an earlier date, and thus from allowing the people to be represented by an elected Senator rather than a temporary appointee. We have already concluded, however, that this issue is not properly before us, and so we express no opinion on that aspect of Illinois's system.

We note, however, that the Illinois statute does not expressly prevent the governor from issuing a writ of election whenever he chooses. Some other states' statutes that concern senate vacancies explicitly prohibit the state executive from issuing a writ in certain circumstances, *e.g.*, CONN. GEN. STAT. ANN. § 9-211(a)(3) (West 2009) (if the vacancy occurs within 62 days of a scheduled election, "the Governor shall not issue such writs and no election shall be held"), but the Illinois statute contains nothing close to the prohibitory language used by these laws. Nor does the Illinois statute appear to command the governor to issue a writ of election. While it is true that some state laws explicitly require the writ to issue, *e.g.*, FLA. STAT. ANN. § 100.161, such a statutory command to the state executive is not necessary. The language of the Seventeenth Amendment is enough on its own to authorize the executive's action, no matter what state law says or does not say. It is enough that the plain language of 10 ILCS 5/25-8 does not seem to interfere with the governor's constitutional obligation to issue a writ.

This is not to say that the plaintiffs' concern that a vacancy election may not happen is misplaced. Such an event would be far from unprecedented. Based on our review of U.S. Senate historical documents, there were 193 vacancies in the Senate between the ratification of the Seventeenth Amendment and the election of President Obama (excluding vacancies caused by a senator's leaving office after a successor is regularly elected). *See* Senate Historical Office, Senators

of the United States 1789-2009 (Feb. 2010), http://www.senate.gov/artandhistory/history/resources/pdf/chronlist.pdf (last visited June 15, 2010); BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774-2005, H.R. DOC. NO. 108-222 (2005), updated version at http://bioguide.congress.gov/biosearch/biosearch.asp (last visited June 15, 2010). Twenty-seven of those vacancies were filled by an appointee who served the remainder of the senate term in question; in those 27 cases, the election to fill the senate vacancy that is required by the Seventeenth Amendment never took place. (Notably, there was never an election to fill the vacancy that was the subject of *Valenti v. Rockefeller, supra.*)

Even though Illinois law appears to set a date for an election to fill a vacancy in the Senate, and Governor Blagojevich's certificate of appointment provided that Senator Burris was to serve "until the vacancy . . . is filled by election as provided by law," the plaintiffs and the Illinois executive branch have taken the position that Senator Burris will remain in office until the next Congress convenes on January 3, 2011. The defendants did not dispute that Senator Burris's tenure will last this long in their briefs or at oral argument. This supports the plaintiffs' argument that President Obama's vacant senate seat may be occupied during the lame-duck session of Congress (November 2, 2010 to January 3, 2011) by a replacement senator who has not been elected by the people. We are not prepared to say that this is such a short period of time that it should be dismissed as *de minimis*. *See Jackson*, 426 F.2d at 1337 ("We are not

prepared to say as a matter of law that representation from the time the results of the November . . . election will be determined to January 3 [of the following year] is *de minimis*.").

What is still missing here is a writ of election. Even though the Illinois statute sets November 2, 2010, as the date for the election to fill the Obama vacancy, that does not mean that the writ is superfluous. To the contrary, a writ of election from Governor Quinn would serve the important function of guaranteeing that the people of Illinois may elect a replacement to President Obama's vacant senate seat on the date set by the Illinois legislature. In addition, it would announce to voters that there will be, in effect, two elections on that day – one to elect a replacement to fill the vacancy and one to elect a senator to the next Congress.

No one has raised, and we therefore do not address, the question how the state is to decide whose names should be on the November 2 ballot for the Obama vacancy. The state might propose a solution acceptable to all parties (*e.g.*, using the candidates who have already qualified for the election for the 112th Congress), so long as that solution complies with Illinois and federal law. We conclude that this issue is better addressed in the first instance by the district court. However Illinois conducts its election for the vacancy, the replacement senator presumably would present his or her credentials to the Senate and take office immediately, while the senator elected

to begin service with the 112th Congress would not take office until January 3, 2011.

C

Senator Burris offers a different reason – one based on federal law – why plaintiffs cannot succeed on the merits of their claim. Relying on federal election law, 2 U.S.C. §§ 1, 7-8, and *Foster v. Love*, 522 U.S. 67, 69-74 (1997), he argues that November 2, 2010, is the only date on which Illinois can hold an election to fill President Obama's seat. Because we have decided that the timing of the election is not properly before us, however, we have no comment on this argument.

V

It is not enough for the plaintiffs to show a likelihood of success on the merits. Critically, they must also show why they will suffer irreparable harm if the preliminary injunction they want does not issue. *Winter*, 129 S. Ct. at 375-76. It is there that their case founders. When they decided to abandon their argument that the special election had to occur as soon as practicable, they effectively disclaimed any urgency in the matter that might justify preliminary injunctive relief. Confronted at oral argument, they were unable to suggest any irreparable harm that they were seeking to avoid. In their reply brief, the plaintiffs address harm in a cursory fashion, which really just reiterates their merits argument. We have

made clear in the past that "[i]t is not the obligation of this court to research and construct legal arguments open to parties, especially when they are represented by counsel," and we have warned that "perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived." *United States v. Holm*, 326 F.3d 872, 877 (7th Cir. 2003) (internal quotation marks omitted). The fact that the plaintiffs leave us essentially in the dark about the irreparable harm that they confront makes it impossible for us to conclude that the district court abused its discretion when it denied the preliminary injunction.

There is still time for the governor to issue a writ of election that will call for an election on the date established by Illinois law and that will make it clear to the voters that they are selecting a replacement for Senator Obama. The district court can easily reach and resolve the merits of this request before any of the harm that the plaintiffs forecast comes to pass. Moreover, circumstances change: Governor Quinn might issue a writ of election tomorrow, or next week.

We detect no irreparable injury that will be avoided through preliminary relief. Bearing in mind that our review is under "the highly deferential abuse of discretion standard," *Burlington N. & Santa Fe Ry. Co. v. Bhd. of Locomotive Eng'rs*, 367 F.3d 675, 678 (7th Cir. 2004), we see no reason to upset the district court's decision to deny the preliminary injunction.

We AFFIRM the order of the district court denying preliminary injunctive relief.

09-1231.091-RSK April 16, 2009

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

GERALD ANTHONY JUDGE and DAVID KINDLER,	)	
Plaintiffs,	)	
v.	)	
PAT QUINN, GOVERNOR of the STATE OF ILLINOIS and ROLAND W. BURRIS, U.S. SENATOR,	)	No. 09 C 1231
Defendants.	)	

MEMORANDUM OPINION

(Filed Apr. 16, 2009)

Before the court are defendants' motions to dismiss the complaint and plaintiffs' motion for a preliminary injunction. We grant defendants' motions and deny plaintiffs' motion for the reasons explained below.

BACKGROUND

The facts alleged in plaintiffs' complaint, which we accept as true for the purposes of defendants' motions, are mostly matters of public record. On November 16, 2008, then-President Elect Obama resigned his Senate seat, creating a vacancy that

former-Illinois Governor Rod Blagojevich filled by executive order appointing defendant Roland Burris. (*See* Certificate of Appointment, dated December 31, 2008, attached as Ex. A to Pls.' Mem. in Supp. of Mot. for Prelim. Inj. (hereinafter, "Pl. Mem.").)[1] The Certificate of Appointment provides that Senator Burris will serve until the seat is "filled by election as provided by law." (*Id.*) Under Illinois's Election Code, that election will be held at the next general congressional election in November 2010. *See* Illinois Election Code, 10 ILCS § 5/25-8. Plaintiffs, registered Illinois voters who intend to vote in the vacancy election, contend that the Seventeenth Amendment requires Governor Quinn to call a special election well in advance of that date. They have filed a two-count complaint, pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201-02, asking us to (i) declare that § 25-8 is unconstitutional, and (ii) require Governor Quinn to "issue a writ for a special election to be conducted as soon as practical." (First Am. Compl. at 6-7.) We denied Senator Burris's request to appear as amicus curiae because we concluded that he must be joined as a party under Fed. R. Civ. P. 19. (*See* Order of Mar. 11, 2009.)[2] Plaintiffs have amended their complaint to

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[1] Senator Burris was sworn in as a United States Senator for the State of Illinois on January 15, 2009.

[2] Senator Burris's amicus-curiae motion, which joins Governor Quinn's motion to dismiss with one exception discussed below, stands as his motion to dismiss.

join him as a defendant, and the parties' motions are now fully briefed.[3]

DISCUSSION

A. Whether the State is Prohibited from Conducting a Vacancy Election on a Date Other Than November 2, 2010.

Senator Burris argues that federal statutes prohibit the state from conducting a vacancy election on any date except November 2, 2010. Because this is an ostensibly non-constitutional basis for denying at least one facet of plaintiffs' claims, we address it first. *See Rehman v. Gonzales,* 441 F.3d 506, 508 (7th Cir. 2006) ("Non-constitutional arguments always come first; constitutional contentions must be set aside until their resolution is unavoidable."). Article I, § 4, cl.1 of the Constitution authorizes the states to set the "Times, Places and Manner of holding Elections for Senators," but "only so far as Congress declines to preempt state legislative choices." *Foster v. Love,* 522 U.S. 67, 69 (1997); *see* U.S. Const. Art. I, § 4, c.1 (authorizing Congress to "make or alter" congressional-election regulations, "except as to the places of

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[3] We have jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3), and we concur with the parties' apparent agreement that plaintiffs have standing. *See Valenti v. Rockefeller,* 292 F.Supp. 851, 853 n.1 (W.D.N.Y. 1968), *aff'd per curiam,* 393 U.S. 405, 89 S.Ct. 689, 21 L.Ed.2d 635 (1969) (concluding that New York voters had standing to challenge the state's vacancy statute under the Seventeenth Amendment).

choosing senators"). Congress requires states to conduct Senate elections on the "Tuesday next after the 1st Monday in November" preceding the date when the incumbent Senator's term expires. *See* 2 U.S.C. §§ 1, 7. Senator Burris argues that these provisions apply to Senate vacancy elections. We disagree. Section 1 applies only to the regularly scheduled Senate election preceding the end of the incumbent's term in office. *See* 2 U.S.C. § 1 ("At the regular election held in any State *next preceding the expiration of the term for which any Senator was elected* to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen. . . .") (emphasis added). A separate provision authorizes states to prescribe the "time" for filling vacancies by election, including vacancies caused by resignation. *See* 2 U.S.C. § 8.[4] Section 8 refers only to "Representative[s]" and "Delegate[s]," but it has been construed to apply by implication to Senators as well. *See Public Citizen v. Miller,* 813 F.Supp. 821, 829 n.8 (N.D. Ca. 1993), *aff'd,* 992 F.2d

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[4] Section 8 provides, with an exception that does not apply in this case:

> [T]he time for holding elections in any State, District, or Territory for a Representative or Delegate to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively.

See 2 U.S.C. § 8.

1548 (11th Cir. 1993); *see also Foster*, 522 U.S. at 71 n.3 (citing *Public Citizen* with approval). This provision authorizes the states to conduct vacancy elections on dates other than the date dictated by 2 U.S.C. §§ 1 and 7. *See Public Citizen*, 813 F.Supp. at 830; *Busbee v. Smith*, 549 F.Supp. 494, 524-25 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983).[5] *Foster v. Love* struck down Louisiana's "open primary" system, which in most instances led to the election of a Senator and/or Representative in the October preceding the November federal election. *Foster*, 522 U.S. at 70. It did not involve a vacancy created by resignation, and does not control the outcome of this case. We

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[5] *See also Trinsey v. Commonwealth of Pennsylvania*, 941 F.2d 224, 226 (3d Cir. 1991) (upholding a statute requiring the Governor of Pennsylvania to declare a special election to fill a Senate vacancy in an odd-numbered year); *Valenti*, 292 F.Supp. at 855 (assuming without discussion that New York had authority to schedule a Senate vacancy election in an odd-numbered year). In authorizing a vacancy election on a date other than federal election day these cases appear to rely on the Seventeenth Amendment's vacancy clause rather than 2 U.S.C. § 8. *Cf. Newberry v. United States*, 256 U.S. 232, 252 (1921) ("As finally submitted and adopted the [Seventeenth Amendment] does not undertake to modify article 1, § 4, the source of congressional power to regulate the times, places and manner of holding elections."). But the result is the same whether this case is governed by § 8, the Seventeenth Amendment, or the states' default authority under Art. I, § 4, c.1 – a vacancy election may be conducted on a date other than federal election day.

reject Senator Burris's argument that a vacancy election can only be held on November 2, 2010.[6]

B. The Seventeenth Amendment and Illinois's Vacancy Statute

Before the states ratified the Seventeenth Amendment in 1913, United States Senators were appointed by state legislatures. *See* Laura A. Little, *An Excursion Into the Uncharted Waters of the Seventeenth Amendment*, 64 Temp. L. Rev. 629, 632 (1991). The Seventeenth Amendment eliminated that practice, providing for direct elections and prescribing the procedure for filling vacancies:

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[6] Senator Burris argues for the first time in his reply brief that pursuant to Article I, § 5 of the Constitution only the Senate can "determine whether a special election is appropriate to curtail his present tenure." *See* U.S. Const. art. I, § 5 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members. . . ."). Arguments raised for the first time in a reply brief are waived. *See United States v. Diaz*, 533 F.3d 574, 577 (7th Cir. 2008). And despite his argument's sweeping implications, Senator Burris has not cited any case law construing Article I, § 5. *See United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991) ("We repeatedly have made clear that perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived (even where those arguments raise constitutional issues)."). Even overlooking these defects, we are not persuaded that a special election would encroach upon the Senate's authority under Article I, § 5. *See Roudebush v. Hartke*, 405 U.S. 15, 25-26 (1972) (concluding that Indiana's recount procedures did not "usurp" the Senate's authority under Article I, § 5 because the Senate would ultimately decide which individual would be seated).

> When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

U.S. Const. amend. XVII. Illinois, pursuant to the proviso, enacted the following vacancy statute soon after the states ratified the Seventeenth Amendment:

> When a vacancy shall occur in the office of United States Senator from this state, *the Governor shall make temporary appointment to fill such* vacancy *until the next election of representatives in Congress,* at which time such vacancy shall be filled by election, and the senator so elected shall take office as soon thereafter as he shall receive his certificate of election.

10 ILCS § 5/25-8 (emphasis added). Plaintiffs contend that this statute is unconstitutional because it usurps the governor's duty to call a special election, authorizes an impermissibly long period of time between the vacancy and the election, and compels (rather than "empowers") the governor to make a temporary appointment in the interim.[7] They rely in part on

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[7] Plaintiffs raised this last objection, which appears to be an issue of first impression, in what was effectively their reply brief supporting their preliminary-injunction motion. It is an entirely new and separate claim challenging Senator Burris's

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cases construing Article I, § 2, cl.4, which governs the procedure for filling vacancies in the United States House of Representatives and contains language nearly identical to the Seventeenth Amendment's "writs-of-election" clause. *See* U.S. Const. art. I, § 2, cl.4 ("When vacancies happen in the Representation from any State, the Executive Authority shall issue Writs of Election to fill such Vacancies."); *Jackson v. Ogilvie*, 426 F.2d 1333, 1336 (7th Cir. 1970) (concluding that the "writs-of-election" clause is mandatory and requires the governor to call a special election, subject to procedural rules set by the state legislature); *American Civil Liberties Union v. Taft*, 385 F.3d 641, 649 (6th Cir. 2004) (similar). That provision does not contain anything comparable to the Seventeenth Amendment's proviso, but plaintiffs argue that the proviso should be read narrowly to preserve the meaning of the writs-of-election clause as interpreted by *Jackson* and *Taft*. According to plaintiffs, the phrase "as the legislature directs" applies only to the procedures governing the special election (ballot access, voter registration, etc.) and not when (or whether) there will be a special election.

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appointment, not the vacancy election's timing. And like Senator Burris's untimely argument, *supra* n.6, plaintiffs' new claim may raise significant standing and justiciability issues. These issues are undeveloped, at best, and defendants have not had an opportunity to be heard. If plaintiffs wish to pursue this claim in light of today's ruling, they should file an amended complaint. For purposes of the pending motions, we address only the operative complaint in this case.

C. Valenti v. Rockefeller

Both parties acknowledge that *Valenti v. Rockefeller* is central to this case. In *Valenti*, a three-judge district court concluded that a New York statute similar to § 25-8 was constitutional, 292 F.Supp. at 853, a decision that the United States Supreme Court summarily affirmed without an opinion. *See Valenti v. Rockefeller*, 393 U.S. 405 (1969). The vacancy in Valenti was created by Senator Robert Kennedy's assassination, which occurred fewer than 60 days prior to New York's spring primary in an even-numbered year. *Id.* at 854. Under New York election law, this meant that the vacancy would be filled at the general election in the next even-numbered year (November 1970), approximately 29 months after the vacancy arose. *Id.* The *Valenti* court rejected the plaintiffs' contention that Seventeenth Amendment's "proviso only allows the legislature to regulate the governor's power of temporary appointment and not the timing of vacancy elections." *Id.* at 855. A "natural reading" of the Amendment "grants the states some reasonable degree of discretion concerning both the timing of vacancy elections and the procedures to be used in selecting candidates for such elections." *Id.* at 856.[8] In reaching this conclusion, the court expressly

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[8] In their supplemental memorandum plaintiffs argue that *Valenti* did not decide which branch of state government is authorized to set the date for the vacancy election. They point out that Governor Rockefeller issued a writ of election and they insist that he, not New York's legislature, scheduled the election for November 1970. (*See* Mot. on Behalf of Appellee to Dismiss

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rejected the argument that the Seventeenth Amendment requires a special election. *Id.* (If the drafters had intended to require a special election, "it is likely that they would have employed clear language to that effect."). But the court also concluded that the legislature's discretion to schedule a vacancy election is not unlimited: "a Governor may make only a '*temporary*' appointment until an election is held." *Id.* (emphasis added). The question, then, was whether New York's vacancy statute exceeded "the limits of the discretion conferred upon the states by the Amendment." *Id.* Surveying other state vacancy statutes, including that of Illinois, the court concluded that they "reflect a consensus of the states that it is permissible for a 'temporary' appointee to hold office until the next regular congressional election before which there remains sufficient time to nominate candidates and conduct a campaign." *Id.*; *see also Smiley*, 285 U.S. at 369 (observing that "long and continuous interpretation in the course of official action under the law" is

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or Affirm, attached as Ex. H to Pl.'s Supp. Mem. in Support of its Mot. for Prelim. Inj., at 6.) We disagree with plaintiffs' contention that *Valenti* did not address the "who-decides-the-date" issue. November 1970 was the date dictated by the statute pursuant to which Governor Rockefeller appointed Senator Kennedy's replacement. *See Valenti*, 292 F. Supp. at 854-55. Here, then-Governor Blagojevich appointed Senator Burris to serve until an election is held "as provided by law." In both cases, the state legislature enacted a statute setting the election's date and the governor issued an order complying with the statute. *Valenti* holds that the Seventeenth Amendment permits this procedure.

persuasive evidence of the law's meaning). New York's statute, and statutes like it, further "substantial state interests" by scheduling vacancy elections when "voter interest and turnout are at a maximum," and when it is most efficient and economical for candidates, who would otherwise have to raise money during an off-year, and for the state itself. *Id.*

Plaintiffs insist that the Supreme Court's summary affirmance in *Valenti* has "limited precedential force." *See Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 180-81 (1979) ("[S]ummary affirmances have considerably less precedential value than an opinion on the merits."); *see also Fusari v. Steinberg*, 419 U.S. 379, 391-92 (1976) (Burger, C.J., concurring) (specifically cautioning lower courts against relying too heavily on summarily affirmed opinions of three-judge district courts). They point out that in Governor Rockefeller's motion to dismiss or affirm he argued, among other things, that the appeal was moot because it was not possible to grant the relief that the plaintiffs had requested in their complaint – *i.e.*, an injunction requiring that voters be given the opportunity to fill the vacancy at the November 5, 1968 election. (*See* Mot. on Behalf of Appellee to Dismiss or Affirm, attached as Ex. H to Pl.'s Supp. Mem. in Support of its Mot. for Prelim. Inj., at 8.)[9] Plaintiffs argue we should assume that the Court

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[9] The three-judge panel in *Valenti* conceded that it could not, as a practical matter, grant plaintiffs this relief given the lawsuit's timing, *id.* at 855 n.6, but concluded that this did not

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affirmed the judgment on that ground and not on the three-judge panel's decision resolving the constitutional question, effectively clearing the way for a contrary ruling. *See Mandel v. Bradley*, 432 U.S. 173, 179-90 (1977) (Brennan, J., concurring) ("The judgment should not be interpreted as deciding the constitutional questions unless no other construction of the disposition is plausible.").

We are not persuaded that *Valenti* affirmed the district court's judgment on mootness grounds,[10] and

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moot the case. *Id.* at 855 (considering whether New York was prohibited from "bypassing its general election in 1969 in favor of filling the vacancy in November 1970").

[10] Neither side has cited any facts or authority that would enable us to meaningfully assess whether Governor Rockefeller's mootness argument was a plausible ground for affirmance. But if, as Governor Rockefeller argued, the plaintiff was constrained by the relief he had requested in his complaint (*cf.* Fed.R. Civ. P. 54(c)), then the case was moot when the lower court rendered its decision. In that case, the Court likely would have dismissed the appeal and vacated, not affirmed, the lower court's judgment. *See Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emp. of America, Division 998 v. Wisconsin Employment Relations Board*, 340 U.S. 416, 418 (1951) ("A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it.") (internal citations and quotation marks omitted); *see also* 13C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure*, § 3533.10 (3d Ed. 2008) ("No difficulty is encountered if an action is moot at the time of the lower court's decision – any decision on the merits is vacated, even if the trial court both ruled that the action was moot and alternatively addressed the merits."). Moreover, the Seventeenth Amendment question was squarely presented in the appellant's

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contrary to what plaintiffs seemed to suggest in their opening brief, we are not writing on a blank slate. The Court revisited *Valenti* in *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982), a case challenging the constitutionality of Puerto Rico's statutes authorizing political parties to appoint interim replacements for their members who vacate seats in Puerto Rico's legislature. "[W]hen a state or the Commonwealth of Puerto Rico has provided that its representatives be elected, 'a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.'" *Id.* at 10 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972)). The Court noted that in *Valenti* it had found "nothing invidious or arbitrary" in the fact that, at any given time, some Senators hold office "by virtue of popular election" and others "by virtue of interim appointment." *Id.* at 11. The Court went on to quote the majority opinion in *Valenti*: "[i]n this case we are confronted with no fundamental imperfection in the functioning of democracy. . . . We have, rather, only the unusual, temporary, and unfortunate combination of a tragic event and a reasonable statutory scheme." *Id.* (quoting *Valenti*, 292 F.Supp. at 867). The Court conceded that *Valenti* was not controlling, but nevertheless concluded that the decision was relevant and persuasive:

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jurisdictional statement. *See* Statement of Jurisdiction, 1968 WL 112482, *4; *cf. Illinois State Board of Elections*, 440 U.S. at 182.

> *Valenti*, of course, unlike this case, involved an interpretation of the Seventeenth Amendment, which explicitly outlines the procedures for filling vacancies in the United States Senate. *See* n. 7, *supra*. However, the fact that the Seventeenth Amendment permits a state, if it chooses, to forego a special election in favor of a temporary appointment to the United States Senate suggests that a state is not constitutionally prohibited from exercising similar latitude with regard to vacancies in its own legislature.

Id. Our Court of Appeals relied on this same language in a case decided shortly after *Rodriguez* upholding a comparable provision applying to aldermanic vacancies. *See Lynch v. Ill. State Board of Elections*, 682 F.2d 93, 96 (7th Cir. 1982) ("*Rodriguez* and *Valenti* clearly show that section 3-2-7 is not constitutionally infirm. Both decisions sustain the authority to fill vacancies in elective offices by appointment, even though the appointee will hold office for the duration of the term.").

Although the *Rodriguez* Court discussed *Valenti* in dicta, we cannot lightly disregard the Supreme Court's "considered" statements. *See United States v. Bloom*, 149 F.3d 649, 653 (7th Cir. 1998) ("It would ill serve the interests of litigants and the judicial system as a whole to row against the tide of such statements."). The analogy in *Rodriguez* to *Valenti* and the Seventeenth Amendment was not "an aside unrelated to the subject matter of the case," *id.* – the parties briefed the issue and it played a meaningful role in

the Court's reasoning. *See Rodriguez,* 457 U.S. at 11 (The procedure that the Court "sustained" in *Valenti* to fill Senate vacancies "suggests that a state is not constitutionally prohibited from exercising similar latitude with regard to vacancies in its own legislature."). *Rodriguez* and *Valenti* squarely contradict plaintiffs' textual interpretation, pursuant to which they argue that Illinois *cannot* "forgo a special election in favor of a temporary appointment." *Id.*; *cf. Jackson,* 426 F.2d at 1336. *Rodriguez* also confirms that the Court was not troubled by the length of the 29-month delay between the vacancy and the election in *Valenti. Id.* at 10-11 (citing the Court's affirmance and observing that it had "sustained the authority of the Governor of New York to fill a vacancy in the United States Senate by appointment pending the next regularly scheduled congressional election – in that case, a period of over 29 months").

Because the vacancy in this case arose shortly after President Obama's election on November 4, 2008, nearly two years will elapse before the vacancy is filled by election. This is nearly the longest delay that § 25-8 permits, and still it is well within the period that *Valenti* allowed. Moreover, the principle that it is more efficient and economical to conduct multiple elections on the same date remains sound. *See Lynch,* 682 F.2d at 97 (eliminating special elections for aldermanic vacancies furthered the state's interest in reducing election costs and maximizing voter turnout). Plaintiffs respond that there are competing considerations specific to Senator Burris's

appointment, and not raised by *Valenti*'s facts, that justify a different result. At the time that he appointed Senator Burris, then-Governor Blagojevich was charged with serious crimes stemming, in part, from his alleged attempts to "sell" President Obama's vacated Senate seat. Plaintiffs argue that the Seventeenth Amendment was adopted, in part, to deter this sort of corruption. *See* Little, *supra*, at 639-40. But the constitutional standard that they advocate, whereby a state statute may or may not violate the Seventeenth Amendment depending upon the circumstances surrounding a particular appointment, is misguided and unworkable. Under *Valenti*, Illinois's statutory scheme is reasonable; the fact that the circumstances of this particular appointment have become one of the subjects of a criminal indictment is constitutionally irrelevant.

Applying *Valenti* and *Rodriguez*, we conclude that § 25/8 does not violate plaintiffs' right under the Seventeenth Amendment to vote in the direct election of their Senator. Accordingly, they are not entitled to a declaratory judgment to the contrary. And because the allegations in their First Amended Complaint do not state a constitutional violation, plaintiffs are not entitled to injunctive relief under § 1983. Defendants' motions to dismiss are granted.

CONCLUSION

Governor Quinn's motion to dismiss (19), and Senator Burris's motion to dismiss (23), are granted.

The complaint is dismissed. Plaintiffs' motion for a preliminary injunction (14) is denied. Plaintiffs are given until May 1, 2009 to file an amended complaint.[11] If they do not do so, this cause will be dismissed with prejudice.

DATE: April 16, 2009

ENTER: /s/ John F. Grady
John F. Grady, United States
District Judge

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[11] *See supra* n.7.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[SEAL]

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ORDER

September 8, 2010

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

JOHN DANIEL TINDER, *Circuit Judge*

GERALD A. JUDGE, et al., Plaintiffs-Appellees, Nos. 10-2836 and 10-3052 v. ROLAND W. BURRIS, U.S. Senator, and PATRICK J. QUINN, Governor of the State of Illinois, Defendants-Appellants.	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. No. 1:09-cv-01231 John F. Grady, Judge.

Upon consideration of the **MOTION FOR STAY OF DISTRICT COURT ORDER OF DEFENDANT-APPELLANT ROLAND W. BURRIS, UNITED**

STATES SENATOR, filed on September 3, 2010, by counsel for the appellant in 10-2836,

IT IS ORDERED that the motion is **DENIED**. However, briefing is these appeals is **EXPEDITED** as follows:

1. The briefs and required short appendices of the appellants are due no later than September 15, 2010.

2. The joint consolidated brief of the appellees is due no later than September 22, 2010.

The parties are advised that the briefs must be received in the clerk's office and served on the opposing party by the specified dates. Fed. R. App. P. 25(a)(2)(B)(i) does not apply. No extensions of time will be granted.

If the panel determines that oral argument is necessary, it will be heard during the week of September 27, 2010, and will be set by separate court order.

Note: Circuit Rule 31(e) (amended Dec. 1, 2001) requires that counsel tender a digital copy of a brief, from cover to conclusion, at the time the paper copies are tendered for filing. The file must be a text based PDF (portable document format), which contains the entire brief from cover to conclusion. Graphic based scanned PDF images do not comply with this rule and will not be accepted by the clerk.

Rule 26(c), Fed. R. App. P., which allows three additional days after service by mail, does not

apply when the due dates for briefs are specifically set by order of this court. All briefs are due by the dates ordered.

Important Scheduling Notice !

Notices of hearing for particular appeals are mailed shortly before the date of oral argument. Criminal appeals are scheduled shortly after the filing of the appellant's main brief; civil appeals after the filing of the appellee's brief. If you foresee that you will be unavailable during a period in which your particular appeal might be scheduled, please write the clerk advising him of the time period and the reason for such unavailability. Session data is located at http://www.ca7.uscourtsgov/cal/calendar.pdf. Once an appeal is formally scheduled for a certain date, it is very difficult to have the setting changed. See Circuit Rule 34(e).

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

GERALD ANTHONY JUDGE and DAVID KINDLER,	)	**No. 09 C 1231**
	)	**Honorable John F. Grady**
Plaintiffs,	)	**Magistrate Judge Michael T. Mason**
v.	)	
PAT QUINN, GOVERNOR of the STATE of ILLINOIS and ROLAND W. BURRIS, U.S. SENATOR,	)	
Defendants.	)	

PERMANENT INJUNCTION ORDER

(Filed Aug. 2, 2010)

This case is before the court on plaintiffs' motion for an injunction consistent with the June 16, 2010 and July 22, 2010 decisions of the U.S. Court of Appeals for the Seventh Circuit in this case, No. 09-2219, and the court being fully advised in the premises,

The court finds, declares, and orders as follows:

1. This court enters this order pursuant to and consistent with the directives of the Court of Appeals in its June 16, 2010 and July 22, 2010 decisions.

2. The Seventeenth Amendment to the Constitution of the United States provides in pertinent part,

> When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

U.S. Const. Am. XVII.

3. The Seventeenth Amendment requires that every time a vacancy occurs in a State's U.S. Senate delegation, the State must hold an election in which the people elect a permanent replacement to fill the vacant seat and that the State's Governor must issue a writ of election that includes a date for such an election to take place.

3. The Seventeenth Amendment further provides that the State's legislature may empower the State's executive authority to appoint a temporary replacement until the vacancy is filled by election. The State's legislature may "direct" such election; this includes the authority to prescribe the date on which the election shall take place.

4. The Illinois Election Code provides,

> When a vacancy shall occur in the office of the United States Senator from this state, the Governor shall make temporary appointment to fill such vacancy until the next election of representatives in Congress, at which time such vacancy shall be filled by election, and the senator so elected shall take

> office as soon thereafter as he shall receive his certificate of election.
>
> 10 ILCS § 5/25-8.

5. On November 16, 2008, a vacancy occurred in the Illinois U.S. Senate delegation upon the resignation of then-Senator Barack Obama. Consistent with the authority conferred upon the Illinois legislature by the Seventeenth Amendment, 10 ILCS § 5/25-8 provides that the election to fill that vacancy shall take place on November 2, 2010. But in prescribing the date for the vacancy election the Illinois legislature did not relieve the Governor of Illinois of his constitutional obligation to issue a writ of election.

6. On July 29, 2010, because of the rulings of the Court of Appeals in this case requiring that the Governor issue a writ of election, the defendant Governor of Illinois issued a writ of election to call an election on November 2, 2010 to fill the vacancy created by the Obama resignation.

7. The court finds that the writ of election issued by the Governor of Illinois complies with the Seventeenth Amendment and 10 ILCS § 5/25-8.

8. The court further finds that, in accordance with the June 16, 2010 ruling of the Court of Appeals, the time during which the Senator elected to fill the Obama vacancy will serve if elected at the November 2, 2010 election is not *de minimis*.

9. After the Court of Appeals issued its decision on June 16, 2010 this court conducted hearings on

June 23, 2010, June 30, 2010, July 21, 2010, July 26, 2010, and July 29, 2010 to consider procedures for conducting a special election on short notice.

10. As the Court of Appeals has held in this case, to the extent that Illinois law makes compliance with a provision of the federal Constitution difficult or impossible, it is Illinois law that must yield to the extent that it otherwise might apply to cause delay or prevent action entirely. Accordingly, this court may formulate, as necessary, mechanisms for the conduct of a special election on November 2, 2010 to fill the U.S. Senate seat vacancy in order to comply with the Seventeenth Amendment consistent with the Court of Appeals' ruling in this case.

11. The court finds that, as in the case of the special election resulting from the decision of the Court of Appeals in *Jackson v. Ogilvie*, 426 F.2d 1333 (7th Cir. 1970), no primary is necessary to select the candidates to appear on the ballot for the special election to fill the vacancy in the U.S. Senate.

12. The candidates placed on the special election ballot must be limited to a manageable number and should be chosen, not arbitrarily, but for having demonstrated a measure of popular support for the office of U.S. Senator.

13. The court finds that the procedures applied in the special election resulting from the decision in *Jackson v. Ogilvie*, 426 F.2d 1333 (7th Cir. 1970), permitting the candidates for the subsequent six-year U.S. Senate term to stand as the candidates for the

special election, also should apply in the special election to fill the current U.S. Senate seat vacancy. Accordingly, the established political party candidates who will appear on the ballot in the special election to fill the vacancy shall be those candidates who won their respective party primaries to run for the full six-year U.S. Senate term in the General Election; and the new political party candidates and independent candidates who will appear on the ballot in the special election to fill the vacancy shall be those candidates who have filed nomination petitions, who meet the signature and other applicable requirements to participate in the race for the full six-year U.S. Senate term in the General Election under Sections 10-2 and 10-3, respectively, of the Illinois Election Code and who are duly certified for that race by the Illinois State Board of Elections.

14. The ballot for the November 2, 2010 election shall be configured so that the choice of candidates to fill the vacancy shall appear immediately following the choice of candidates for the full six-year U.S. Senate term. The order of the parties and candidates on the special election ballot for the vacancy shall be the same as for the full six-year term.

15. The State Board of Elections (SBE) shall canvass the votes cast for the Special Election for U.S. Senator within 5 calendar days following receipt of the abstracts of votes from the Election Authorities. The Election Authorities shall transmit such abstracts to the SBE by e-mail attachment or by facsimile no later than the close of business on Friday,

November 19, 2010. The 5 calendar day time period for the SBE to conduct its canvass may be extended up to 3 additional calendar days in the event that not all such abstracts are received by the SBE on Friday, November 19, 2010 or that such abstracts contain errors or inconsistencies that are unable to be resolved within said 5 calendar days.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

a. The November 2, 2010 special election to fill the vacancy in the U.S. Senate created by the resignation of then-Senator Barack Obama on or about November 16, 2008 shall be conducted consistent with the findings and declarations in this order.

b. The Governor's temporary appointee shall continue his period of service in the U.S. Senate until the winner of the special election has taken the oath of office to serve out the remainder of former Senator Obama's term.

IT IS FURTHER ORDERED that notice of this injunction order shall be served on the Illinois State Board of Elections and the Illinois Secretary of State pursuant to Federal Rule of Civil Procedure 65(d)(2).

IT IS FURTHER ORDERED that this court shall retain jurisdiction for the purpose of ensuring that the special election is

conducted in accordance with the terms of this order.

/s/ John T. Grady
United States District Judge

Date: August 2, 2010

STATE OF ILLINOIS

[SEAL]

EXECUTIVE DEPARTMENT
SPRINGFIELD, ILLINOIS

(Filed Jul. 29, 2010)

To the County Clerks of ALL COUNTIES
in the State of Illinois and to ALL
OTHER ELECTION AUTHORITIES
in the State of Illinois, Greetings

WHEREAS, Because of the resignation of the Honorable Barack Obama from the Office of United States Senator for the State of Illinois, the United States Court of Appeals for the Seventh Circuit has ruled that a writ of election must issue authorizing a special election to select a successor Senator to serve for the remainder of President Obama's original senate term.

Now, THEREFORE, I, PATRICK J. QUINN, Governor of the State of Illinois, do hereby command you to cause a SPECIAL ELECTION to permanently fill such vacancy for the remainder of Hon. Obama's term to be held in the STATE OF ILLINOIS on TUESDAY, NOVEMBER 2, 2010 in conformity with any applicable federal court orders and, to the extent feasible, with the Illinois Election Code and other Statutes in such case made and provided.

In Testimony Whereof, I have hereunto set my hand and caused the Great Seal of the State of Illinois to be affixed.

Done at the Capitol, in the City of Springfield, this twenty-ninth day of July, in the Year of Our Lord two thousand and ten, and of the State of Illinois the one hundred and ninety-first.

[SEAL]

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179 (3) (2)

Nos. 10-367, 10-821

Supreme Court, U.S.
FILED
JAN 20 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

ROLAND WALLACE BURRIS, U.S. SENATOR,

Petitioner,

v.

GERALD ANTHONY JUDGE, et al.,

Respondents.

PAT QUINN, GOVERNOR OF THE STATE OF ILLINOIS,

Petitioner,

v.

GERALD ANTHONY JUDGE, et al.,

Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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STATEMENT

The principal clause of the Seventeenth Amendment provides: "When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies." The Seventh Circuit held that this provision means what it says: when a state's Senate seat becomes vacant, that state's Governor is required to issue a writ of election to fill that vacancy. That is the *only* legal obligation the court below held that the Seventeenth Amendment imposes on the states. No other federal court has ever addressed this question.

The Quinn petition misunderstands or mischaracterizes the Seventh Circuit's opinion. That misunderstanding is the basis for the petition's expansive presentation of the decision below, as well as its suggestion of a conflict. But contrary to the suggestions in the petition, the Seventh Circuit imposed no constitutional requirements with respect to the timing of, or the procedures for, vacant Senate elections. Instead, the decision expressly states, numerous times, that *state* law controls the timing and procedural aspects of vacancy elections for Senate seats. The only obligation the Seventeenth Amendment imposes, in the view of the court below, is that the Governor must issue a writ of election. The court held that state law determines the date or range of dates for which that writ issues, as well as all other procedural aspects of that election.

1. This dispute involves who is entitled to hold a Senate seat during a narrow period of time: the lame-duck session of a sitting Congress. Illinois' Election Code already provides that a Senate vacancy can temporarily be filled by appointment until the next biennial congressional election, at which time the Senator elected "shall take office as soon thereafter as he shall receive his certificate of election." 10 ILCS § 5/25-8 (2008). The State acknowledges that this provision already requires an election to fill a Senate vacancy before the term for that office expires. Quinn Pet. at 3-4 n.1. Thus, there is no dispute that the Governor may make temporary appointments to fill vacant Senate seats and that those temporary appointments can last, at most, until the next biennial congressional election.

2. Illinois contends, however, that both its election laws and the Seventeenth Amendment permit its Governor to "temporarily" fill a vacant Senate seat through a gubernatorial appointment that lasts through the next regularly scheduled biennial election and extends all the way until a new Congress begins. Thus, in the State's view, the Governor had the legal right never to issue a writ of election to fill Illinois' vacant Senate seat. Instead, the Governor could have appointed a Senator who would serve, not just temporarily until the next regularly scheduled congressional election, but permanently, until the next session of Congress, at which a newly elected Senator would begin a new six-year term.

3. The court below rejected this claim on the basis of a careful textual reading of the Seventeenth Amendment. The court was required to construe the principal clause of that Amendment, along with its accompanying proviso. The full text of the Amendment reads:

> When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, that the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct. U.S. Const. amend. XVII para. 2.

The Seventh Circuit held that the principal clause requires the chief executive of a state to issue a writ of election to fill a Senate vacancy. The proviso permits the state legislature to authorize the governor initially to make a temporary appointment, and to regulate the manner and processes of the election to permanently fill the vacancy. The court also concluded that any temporary appointment ends when the people fill the vacancy in an election.

The court concluded that its textual analysis of the plain meaning of the Seventeenth Amendment was consistent with other directly relevant provisions in the Constitution's text. Thus, the court found its analysis consistent with the provision in Article I, Section 2 that governs the filling of vacant House

seats. Similarly, the court concluded that the Seventeenth Amendment continued the same essential structure of the provision that had governed the filling of vacant Senate seats in the original, unamended Constitution, when state legislatures, rather than the people, chose Senators. *See* U.S. Const. art. I, § 3, cl. 2.

4. The court below did not decide how long a temporary appointment to a vacant Senate seat can last under the Seventeenth Amendment. Nor did the court decide how much time may elapse between the start of a vacancy and an election to fill it. *See* Quinn Pet. App. at 20a ("we do not have before us any properly presented question about how long a temporary appointment may last under the Seventeenth Amendment, nor the closely related question how much time can elapse between the start of a vacancy and an election to fill it."); *see also* Quinn Pet. App. at 38a ("we have decided the timing of the election is not properly before us . . . "). These questions are not presented here.

Instead, Judge Wood's opinion for the Seventh Circuit decided only that the Seventeenth Amendment requires a Governor to issue a writ of election to fill a vacant Senate seat. *See* Quinn Pet. App. at 14a ("the only question properly before us is whether . . . Illinois' governor, by command of the Seventeenth Amendment, must issue a writ setting an election to fill the Obama vacancy . . . "). In deciding only this narrow question, the Seventh Circuit made clear – contrary to petitioners' suggestion – that its decision

was not in conflict with the three-judge court's decision in *Valenti v. Rockefeller*, 292 F. Supp. 851 (W.D.N.Y. 1968) *aff'd without op.*, 393 U.S. 405 (1969). As the Seventh Circuit noted, *Valenti* had "nothing to say about that issue." *Id.* at 21a. Indeed, the Seventh Circuit noted that *Valenti* "could not have decided that question," because the Governor had already issued a writ of election in the *Valenti* context. *Id.*

Having concluded that the Amendment requires the Governor to issue a writ of election, the Seventh Circuit then held that state law determined the date on which that election was to take place. As the court concluded, "[s]tate law controls the timing and other procedural aspects of vacancy elections." *Id.* at 33a. The court summarized its holding in these terms: the Amendment "imposes a duty on state executives to make sure that an election fills each vacancy; it obliges state legislatures to promulgate rules for vacancy elections; and it allows for temporary appointments until an election occurs." *Id.* at 34a.

5. The State's position is that the portion of the proviso that authorizes vacancies to be filled "by election as the legislature may direct" permits the legislature to "direct" that there be no election at all, whenever the legislature concludes it would be better not to hold an election. *See* Quinn Pet. at 24-25 n.15 (arguing that this provision "surely" permits the legislature to refuse to schedule an election "where holding one would run contrary to the public interest."). The Seventh Circuit held that this position could not be squared with the Seventeenth Amendment. The court concluded that this provision empowers the

state legislature to direct the manner and timing of the election, but not to eliminate it altogether. The court held that the proviso gives state legislatures similar regulatory powers over special elections to fill Senate vacancies as the Elections Clause, U.S. Const. art. I, § 4, cl. 1, gives the states over regulation of ordinary House and Senate elections. But just as the Elections Clause does not give state legislatures the power to cancel or avoid House or Senate elections whenever the legislature concludes holding an election would "run contrary to the public interest," the proviso to the Seventeenth Amendment does not give state legislatures such power to cancel or avoid the Senate election the Seventeenth Amendment requires.

6. The State also argues that the courts should recognize a "*de minimis*" exception to the Seventeenth Amendment obligation to fill vacant Senate seats with elections. Pointing to a hypothetical situation in which a vacancy might arise just days or weeks before the expiration of a Senate term, the Quinn petition continues to assert that there are at least some contexts in which it would be "impossible" to hold a valid, organized election. Quinn Pet. at 27. In such a case, Illinois asserts, the Seventeenth Amendment should not require the State to hold an election.

But as petitioner concedes, the Seventh Circuit recognized the possibility that in some other extreme context that has never been litigated and that was not before it in this case – such as a vacancy that occurs with only days left in a Senate term – a *de*

minimis exception to the constitutional obligation might be appropriate. Quinn Pet. at 8; *see also Jackson v. Ogilvie*, 426 F.2d 1333, 1336 (CA 7 1970); (recognizing such an exception in context of constitutional obligation to fill vacant House seats by election). The Seventh Circuit held, however, that the lame-duck session of a Congress is not a *de minimis* period of public service so devoid of substantive policymaking decisions as to justify an exception to the obligation the plain text of the Seventeenth Amendment imposes. In the most recently completed lame-duck session – the one at issue in this litigation – the Senate ratified the START arms-control treaty with Russia, approved major tax and fiscal policy legislation, repealed the "Don't Ask, Don't Tell" statute regarding military service, approved the 9/11 first responders bill, approved new food-safety legislation, and rejected major immigration reform in the proposed Dream Act. This record is ample confirmation of the Seventh Circuit's conclusion that, whatever the scope of a judicially-created *de minimis* exception to the Seventeenth Amendment might be, the lame-duck session of the Senate cannot fall within such an exception.

REASONS THE PETITIONS SHOULD BE DENIED

This case is moot. The special election at issue has occurred and the elected Senator has served his term. Nor do the issues or the parties meet the standards required to demonstrate that an exception

to mootness is warranted under this Court's "capable of repetition, yet evading review" requirements.

Moreover, there is no conflict between the courts of appeals on the actual holding of the court below. The Seventh Circuit correctly held that the plain language of the Seventeenth Amendment requires a Governor to issue a writ of election to fill a vacant Senate seat. No other federal court has ever addressed this question, let alone held to the contrary. Indeed, petitioners identify only two federal court decisions that have ever even *discussed* the meaning of the Seventeenth Amendment regarding whether the Amendment requires an election to fill a vacancy. But no conflict exists between these two decisions and the Seventh Circuit opinion. In the absence of any conflict among the lower courts or between this Court and the decision below, review by this Court would be premature.

Finally, the Burris petition should be denied on jurisdictional and other grounds.

I. THE PETITIONS SHOULD BE DISMISSED AS MOOT

The special election that the Seventh Circuit required to fill Illinois' vacant Senate seat for the lame-duck session of the 111th Congress has taken place. The elected Senator has fully served out his term. The petitions are therefore moot. Nor does this case fit the exception to mootness for cases capable of

repetition, yet evading review. That "exception applies where '(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.'" *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007) (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998).

First, a legal challenge regarding whether the Seventeenth Amendment requires a Governor to issue a writ of election to fill a vacant seat does not involve an issue that is inherently of such a nature or duration as to be too short to be litigated fully in most contexts. President-elect Barack Obama resigned his Senate seat with two years and 48 days remaining in his Senate term. During those two years, the District Court issued one published memorandum opinion and an order denying respondents' request for a preliminary injunction; the Seventh Circuit issued a full opinion holding that the Governor was required to issue a writ of election but affirming the denial of the preliminary injunction; petitioners moved to amend the opinion or for rehearing; the Seventh Circuit issued a modification to its original opinion; petitioner Burris sought a stay from the Seventh Circuit and from Justice Breyer, all of which were denied; the case was remanded to the District Court, which held five days of hearings and then issued a second published memorandum opinion, this time specifying the details of the special election; and the Seventh Circuit issued a second full opinion on the

merits affirming the District Court's most recent decision. The time scale involved and the number of hearings, appeals, decisions, and full opinions issued in this case make clear that this issue is not by its nature "too short to be fully litigated prior to cessation or expiration."

Indeed, the State itself delayed seeking this Court's review. The initial opinion of the Seventh Circuit was issued on June 16, 2010. Instead of seeking review of that decision, the Governor sought a rehearing, which was denied on July 22, 2010. At that time, there was ample time to seek a stay from this Court and to seek review on an expedited basis. Instead, the state delayed seeking review, then sought and was granted an extension of time by this Court until December 19, 2010 to file its certiorari petition.

Second, and even more importantly, there is no basis to support a reasonable expectation that "the same complaining party will be subject to the same action again." Indeed, in the 98 years since adoption of the Seventeenth Amendment, Illinois has been faced with the need to appoint a Senator only three times, including the context at issue here.[1] For Illinois to be subject to "the same kind of order in the future," *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975), a Senate vacancy would have to arise; state legislation would have to continue to give the Governor the

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[1] http://www.senate.gov/artandhistory/history/common/briefing/senators_appointed.htm

power to fill that vacancy through a temporary appointment; and a future Illinois Governor would have to decide he or she preferred to fill that vacancy with an appointment that ran all the way until the start of the next Congress, rather than until the next election.

This is much too remote and speculative a basis, under this Court's decisions, to support invoking the narrow exception to the mootness doctrine. "The Court has never held that a mere physical or theoretical possibility was sufficient to satisfy the [requirements for the capable-of-repetition exception to mootness]." *Murphy v. Hunt,* 455 U.S. 478, 482 (1982). Instead, the Court has required a "'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same [parties]." *Id.* At this point, this "case" is about "an abstract dispute" of law. *Alvarez v. Smith,* 130 S. Ct. 576, 580-81 (2009). "And a dispute solely about the meaning of a law, abstracted from any concrete actual or threatened harm, falls outside the scope of the constitutional words 'Cases' and 'Controversies.'" *Id.* That is this case.

Finally, that Burris will never be in the same position again is virtually certain. Thus, his petition, too, is moot.

II. NO CIRCUIT CONFLICT EXISTS AND REVIEW BY THIS COURT WOULD BE PREMATURE

This case is the only occasion on which any court at any level has considered whether the Seventeenth Amendment requires a state's governor to issue a writ of election when a vacancy occurs in one of that state's Senate seats. Petitioners' contention that the Seventh Circuit's decision conflicts with this Court's affirmance in *Valenti v. Rockefeller*, 292 F. Supp. 851 (W.D.N.Y. 1968), *aff'd without op.*, 393 U.S. 405 (1969) and with *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982) is thus wrong. Neither case decided – or even litigated – the question of whether the Seventeenth Amendment requires a Governor to issue a writ of election to fill a vacant Senate seat.

In *Valenti*, the New York statute expressly commanded the Governor of New York to issue a writ of election when a vacancy occurred in the Senate. Moreover, Governor Rockefeller had issued that writ in August, 1968 and had set a special election for November, 1970. Quinn Pet. App. at 21a. Thus, the three-judge court was not called upon to decide whether the Seventeenth Amendment requires a governor to issue a writ of election to fill a vacant Senate seat.[2]

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[2] As it turns out, for a reason never explained, the State of New York ignored Governor Rockefeller's writ of election and did not actually conduct a special election in November, 1970. But the lack of such an election was neither litigated nor blessed by either this Court or the three judge court.

Instead, the only issue actually decided in *Valenti* was the timing of that election. Robert Kennedy had been assassinated on June 6, 1968. Filing suit in July, 1968, the plaintiffs contended that the Seventeenth Amendment required his Senate seat to be filled at the November, 1968 general election. New York law, however, provided that if such a vacancy arose less than 60 days before the state's regularly scheduled primaries, the vacancy would be filled at the next general election. *Valenti* held that this state law did not violate the Seventeenth Amendment; New York was not constitutionally required to fill the vacant seat at the November, 1968 elections, when so little time had been available between the vacancy and those elections. Under *Valenti*, New York could constitutionally delay the vacancy election until November, 1970.

The Seventh Circuit did not confront a situation in which Illinois clearly stated that no special election to fill a vacant Senate seat should occur if that vacancy *arose* less than some number of days before the next regularly scheduled general election. Indeed, President-elect Obama's seat became vacant nearly two years before the next regularly scheduled general election. Instead, Illinois law provides simply that a vacant Senate seat is to be filled at the next general election. 10 ILCS § 5/25-8 (2008). The Seventh Circuit held that, when state law requires a vacant Senate seat to be filled at a specific general election, the elected Senator takes office as soon as the election result is certified. That holding is also consistent with the New York statute at issue in *Valenti*; that statute provided that the governor's temporary appointment

to fill the seat was effective only until December 1, 1970. *See Rodriguez v. Popular Democratic Party,* 457 U.S. 1, 11 n.11 (1982) (citing *Valenti v. Rockefeller*, 292 F.Supp. 851, 853 (SDNY 1968)).

The Seventh Circuit did not hold that the Seventeenth Amendment requires a state to hold an election immediately or "as soon as practicable" or anything similar. Instead, the court held that the Amendment requires the Governor to issue a writ of election; state law determines the date on which that election takes place; when state law sets that election date as the next general election, the newly elected Senator must be permitted to assume the vacant seat as soon as the election results are certified. That holding is not in conflict with *Valenti*. Indeed, the Seventh Circuit analyzed *Valenti* and made clear its own view that its decision was consistent with *Valenti*. Quinn Pet. App. at 20a-21a.

The petitions also assert that the decision below conflicts with this Court's decision in *Rodriguez v. Popular Democratic Party,* 457 U.S. 1 (1982). But *Rodriguez* did not involve the meaning of the Seventeenth Amendment at all, nor did it involve a United States Senate seat. Rather, the decision upheld the right of Puerto Rico, as against an equal-protection challenge, to enact a statute to permit the political parties to fill vacancies in the Puerto Rico legislature without Puerto Rico holding any special election. This Court held that there is no fundamental right to vote to fill a vacant state legislative seat. The Seventeenth Amendment's "shall issue writs of election" language

was not in issue. The decision below, of course, does not recognize any fundamental right to vote to fill a vacant Senate seat, but instead applies the language of the Seventeenth Amendment in the specific context of filling a vacant Senate seat.

Rodriguez noted that the Seventeenth Amendment permits a state to authorize its Governor to make a temporary appointment to fill the vacant seat. But there is nothing controversial in that, nor is there anything in the Seventh Circuit's decision that takes issue with that obvious fact.[3]

Thus, there is no conflict between the Seventh Circuit's holding in this case and that of any other court. The Seventh Circuit's decision is the first and only decision on the meaning of the Seventeenth Amendment's command to governors to issue writs of election.

Perhaps recognizing the weakness of its claim of a purported conflict, the Quinn petition alleges that the Seventh Circuit's decision conflicts with election laws in 13 States. But for two reasons, this untested assertion does not provide an adequate justification

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[3] In *Rodriguez*, this Court, referring to *Valenti*, commented "that the Seventeenth Amendment permits a state, if it chooses, to forgo a special election in favor of a temporary appointment to the United States Senate." 457 U.S. at 11. But since those were not the facts of *Valenti*, that statement was mere *dicta* and can hardly be taken as a reasoned analysis by this Court of the "shall issue writs of election" language as undertaken by the Seventh Circuit here.

for certiorari. First, none of the cited states is in the Seventh Circuit. *See* Quinn Pet. at 17 n.6. Thus, the Seventh Circuit's decision does not directly control the constitutional question with respect to any of these statutes. Should any of those statutes be challenged, other federal courts will have the opportunity to examine the precise meaning of the relevant state statute; to decide whether to come to similar or different conclusions from the Seventh Circuit regarding the constitutional question; and, if the later court reaches the same legal conclusion as the Seventh Circuit, to decide how that conclusion should be applied in the context of that particular state statute. Once again, it would be premature for this Court to intervene on the basis of speculative assertions about how the Seventh Circuit's decision would apply in states outside that circuit, should the issue ever get litigated in those other states.

Second, the actual meaning of these various state statutes for filling Senate vacancies has never been judicially tested. Senate vacancies arise in myriad circumstances, ranging from the start of a new term to its end. The manner in which these 13 state statutes would apply to the filling of vacant Senate seats, under a variety of specific circumstances – including the amount of time remaining in the term when the vacancy occurs – can only be guessed at outside an actual case that tests that question concretely.

Moreover, the other states' statutes vary widely from Illinois' statute and from each other. For example, California Elec. Code § 10720 provides that the

appointee shall serve out the term "unless the vacancy is filled at a special election held prior to the general election," a provision not included in the Illinois statute. Connecticut Gen. Stat. Ann. § 9-211 provides that the appointee shall serve out the term only if the vacancy occurs less than 62 days before the next election. Maryland Code Ann., Elec. Law § 8-602 allows the appointee to serve out the term only "if the vacancy occurs after the date that is 21 days before the deadline for filing certificates of candidacy for the election that is held in the fourth year of the term."

None of these statutes has been tested in a lower federal court against the command of the Seventeenth Amendment or in any particular fact situation. The meaning of these statutes, their application in the various contexts in which vacancies might occur, and the way in which federal courts of appeals would ultimately rule on the Seventeenth Amendment question with respect to any of these applications is completely speculative. In addition, states have been moving away from appointments and to early special elections to fill Senate vacancies. Massachusetts and West Virginia have done so recently to fill the vacancies created by the deaths of Senators Ted Kennedy and Robert Byrd. There is no need for this Court to grant certiorari based on such speculative assertions about the meaning of other, untested state statutes – some of which are being changed or eliminated – from states outside the Seventh Circuit.

III. THE BURRIS PETITION SHOULD BE DENIED ON JURISDICTIONAL AND OTHER GROUNDS

Petitioner Burris seeks a prejudgment writ of certiorari based on a district court opinion entered on August, 2, 2010. His petition expressly asserts jurisdiction only under Rule 11 of this Court and 28 U.S.C. § 2101(e). Justice Breyer denied Burris' application for a stay pending the filing and disposition of a petition for a writ of certiorari before judgment. After the filing of that petition, however, the Seventh Circuit on September 24, 2010, issued a final decision in the appeal from that district court decision. The Seventh Circuit affirmed the district court decision at issue in Burris' appeal. Thus, there is no longer any jurisdictional basis under Rule 11 and 28 U.S.C. § 2101(e) for Burris' pending petition.

Rule 11 applies to "review a case pending in a United States court of appeals, *before* judgment is entered in that court." Sup. Ct. R. 11 (emphasis added). Similarly, the jurisdictional statute Burris invokes empowers this Court to grant a writ of certiorari "before judgment has been entered in" the court of appeals. Once the Seventh Circuit rendered judgment in Burris' appeal, these jurisdictional bases for seeking review of *the district court's opinion* under Rule 11 and 28 U.S.C. § 2101(e) evaporated. If Burris now desires to have this Court review the opinion of the Seventh Circuit affirming the district court's decision, the proper course was for Burris to file a timely petition for certiorari to the Seventh Circuit under 28 U.S.C. § 1254(1).

Instead, Burris has filed what he calls a "Supplemental Brief" describing the "impact" of the Seventh Circuit's decision on his Rule 11 petition. This "Supplemental Brief" does not assert any new jurisdictional basis for his petition. Thus, Burris' petition still seeks review of the *district court's decision* under Rule 11 and 28 U.S.C. § 2101(e). But because the Court of Appeals has now rendered judgment, there is no longer any jurisdictional basis in either of those provisions for Burris' petition.

Even assuming Rule 11 still applies to Burris' petition, that petition is certainly not of "such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Burris' petition challenges the rules and procedures the state of Illinois used to conduct a special election on November 2, 2010 to fill out the remaining term, until January 3, 2011, of the Senate seat that had become vacant when President-elect Obama resigned from that seat. That special election has taken place already; the candidate who won that election, Republican Mark S. Kirk, has already finished serving out the entire term at issue. The 112th Congress is now seated. Thus, none of the circumstances that justify certiorari before judgment in the Court of Appeals is present here. Burris' effort to stop that election or have it conducted under other rules is now moot and makes all the more inappropriate any exercise of this Court's extraordinary jurisdiction under Rule 11 and 28 U.S.C. § 2101(e).

Finally, to the extent Burris' Rule 11 petition and "Supplemental Brief" might be treated as a petition for certiorari under 28 U.S.C. § 1254(1), the petition should be denied. Not only is Burris' petition moot, but the questions it presents are also not worthy of this Court's exercise of its discretionary jurisdiction. Those questions involve the unique circumstances and procedures under which Illinois conducted its special election to fill its vacant Senate seat. The courts below looked to Illinois law and procedure to determine the appropriate ground rules under which that election should be conducted, given the unique time pressures involved. If federal courts ever order another election to fill a vacant Senate seat, there is no compelling reason to assume the circumstances will be identical to those in this case. Thus, the issues Burris presents are too fact bound and unique to warrant a grant of certiorari.

IV. TO THE EXTENT THE PARTIES DISPUTE MOOTNESS, THE COURT SHOULD SIMPLY DENY CERTIORARI

In a case like this one, in which there are multiple grounds for denial of further review, including mootness and lack of a sufficient basis on the merits to warrant a grant of certiorari, the proper course is to deny the petition for certiorari. As the leading treatise on Supreme Court practice notes: "[O]bservation of the Court's behavior across a broad spectrum of cases since 1978 suggests that the Court denies certiorari in arguably moot cases unless the petition

presents an issue (other than mootness) worthy of review." E. Gressman et al., *Supreme Court Practice* (9th ed. 2007), at 939, n.33. The Court should follow that practice here and simply deny certiorari.

When the parties disagree about mootness – as is the case here – but the case is otherwise not worthy of a grant of certiorari, there is little reason for the Court to waste its limited judicial resources on resolving the mootness issue. As is the case here, that issue can be highly dependent on factual issues that the parties dispute. Because the underlying questions are not worthy of certiorari review, the Court should simply deny the petitions.

CONCLUSION

For these reasons, respondents respectfully request that the Court deny the petitions.

Respectfully submitted,

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In the Supreme Court of the United States

ROLAND WALLACE BURRIS, UNITED STATES SENATOR,
PETITIONER,

v.

GERALD ANTHONY JUDGE, DAVID KINDLER, AND GOVERNOR PAT QUINN, RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether certiorari review is warranted where petitioner's claims are moot as to him, petitioner took contrary positions below or otherwise forfeited the arguments in the petition, and another pending petition provides a far better vehicle for answering the only issue in this case warranting Supreme Court review.

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BRIEF IN OPPOSITION

The certiorari petition should be denied. The November 2, 2010 election is now past, and President Obama's original Senate term has expired. Accordingly, the claims in his petition are moot, and petitioner does not qualify for an exception to the mootness doctrine. Nor has petitioner properly preserved the claims in his petition. As to each, he took a contrary position below or otherwise forfeited the argument that he seeks to advance in this Court. Moreover, the first and third questions presented lack merit and are not worthy of Supreme Court review.

Governor Quinn agrees that the second question raises an issue warranting certiorari review, and it is the subject of the Governor's own petition (No. 10-821), now pending before this Court. This issue—whether the Seventeenth Amendment requires a special election whenever a Senate vacancy arises, even when the original Senate term expires immediately following the next general election—is of critical importance to Illinois and other States. Granting Senator Burris' petition to decide that issue, either alone or in conjunction with Governor Quinn's petition, would needlessly complicate an important case with threshold questions involving mootness, forfeiture, and the failure to preserve points below.

STATEMENT

1. Effective November 16, 2008, President-elect Barack Obama resigned his seat in the U.S. Senate, with two years and 48 days remaining on his Senate term. Pet. App. 6a. Pursuant to authority conferred on the State by the Seventeenth Amendment, § 25-8 of Illinois' Election Code authorizes the Governor to appoint a replacement Senator in the event of such a vacancy, see 10 ILCS 5/25-8 (2008), and on December 31, 2008, then-Governor Rod Blagojevich appointed petitioner to the vacant seat. Pet. App. 6a. Petitioner was sworn in as a U.S. Senator on January 15, 2009. Pet. App. 7a.

2. Shortly after petitioner's appointment, respondents Gerald Judge and David Kindler, Illinois voters (hereinafter "plaintiffs"), filed suit against respondent Governor Pat Quinn in the U.S. District Court for the Northern District of Illinois, alleging that § 25-8 violates the Seventeenth Amendment by permitting a Governor's Senate appointee to serve for an unreasonably long period of time, and by not requiring the Governor to issue a writ of special election to fill the seat. Pet. App. 7a-8a. Plaintiffs sought (1) a declaration that § 25-8 violates the Seventeenth Amendment and (2) an injunction directing petitioner to "'issue a writ for a special election to be conducted as soon as practical to fill the vacancy.'" Pet. App. 8a. Plaintiffs also moved for a preliminary injunction ordering the Governor to "'issu[e] a writ setting an election to fill the vacancy in the Senate seat, not in November, 2010,'" as Illinois law required, "'but at the earliest practical date.'" Pet. App. 8a.

Governor Quinn moved to dismiss the complaint, and Senator Burris sought leave to file a brief *amicus curiae* in support of the Governor's motion. Pet. App. 8a. Rather than grant him leave to participate as an *amicus*, however, the district court added Senator Burris as a necessary party to plaintiffs' suit under Federal Rule of Civil Procedure 19, and treated his putative *amicus* brief as a motion to dismiss plaintiffs' complaint. Pet. App. 48a & n.2.

3. In a memorandum opinion and order filed on April 16, 2009, the district court denied plaintiffs' motion for preliminary injunction and dismissed their complaint without prejudice. Pet. App. 47a.[1] The court rejected plaintiffs' claim that the time between President Obama's Senate resignation and the next general election on November 2, 2010 was unreasonably long. Pet. App. 61a-62a. The court agreed with the Governor that *Valenti v. Rockefeller*, 292 F. Supp. 851 (W.D.N.Y. 1968), aff'd, 393 U.S. 405 (1969) (*per curiam*), and *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982), "squarely contradict plaintiffs' textual interpretation, pursuant to which they argue that Illinois *cannot* 'forgo a special election in favor of a temporary appointment.'" Pet. App. 61a (quoting *Rodriguez*, 457 U.S. at 11) (emphasis in original).

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[1] Plaintiffs have since filed an amended complaint, raising, among other claims, a new constitutional theory, first advanced in their reply brief in support of their motion for preliminary injunction, and this complaint remains pending in the district court.

Because the period between President Obama's Senate resignation and the next Congressional election in November 2010 was shorter than the 29 months upheld in *Valenti*, the court rejected plaintiffs' constitutional challenge, dismissed their complaint without prejudice, and denied their motion for preliminary injunction. Pet App. 61a-62a.

4. Plaintiffs appealed, and although the Seventh Circuit affirmed the denial of their motion for preliminary injunction (because they could not show irreparable harm, Pet. App. 44a-45a) the court ordered "two elections" for the same Senate seat on November 2, 2010. The court ordered a regular election for the new, six-year term beginning in January 2011, and a special election for the remaining weeks of President Obama's original Senate term. Pet. App. 43a-44a. The court did not resolve "how the state is to decide whose names should be on the November 2 ballot for the Obama vacancy" but suggested that "[t]he state might propose * * * using the candidates who have already qualified for the election for the 112th Congress[]; so long as that solution complies with Illinois and federal law." Pet. App. 43a. On July 22, 2010, in response to a motion by Governor Quinn to amend the panel opinion or, alternatively, for rehearing by the full court *en banc*, the panel amended its opinion to make clear that the State may have to "disregard provisions of state law that otherwise might ordinarily apply" to certify the special election results "as soon as possible, so that the replacement senator may present his or her credentials to the Senate and take office promptly." Pet. App. 2a-3a.

5. Meanwhile, beginning on June 23, 2010, the district court held a series of five hearings to implement the Seventh Circuit's decision. In the midst of these proceedings, and following the Seventh Circuit's July 22, 2010 ruling, the Governor issued a writ calling for a special election on November 2, 2010, "[b]ecause * * * the United States Court of Appeals for the Seventh Circuit has ruled that a writ of election must issue authorizing a special election to select a successor Senator to serve for the remainder of President Obama's original senate term." Pet. App. 74a.

6. On August 2, 2010, following the completion of all five hearings, the district court entered an injunction setting out the mechanics of the special election, including the fact that the same list of candidates slated to appear for the regularly scheduled Senate election would also be used for the simultaneous, special election. Pet. App. 67a-73a. At the November 2 general election, therefore, Illinois voters cast ballots for both an interim Senator and a Senator for the full term beginning on January 3. Then-Congressman Mark Kirk won both elections, and he resigned his House seat and assumed President Obama's vacated Senate seat on November 29, 2010.[2]

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[2] See http://bioguide.congress.gov/scripts/biodisplay.pl?index=K000360.

7. Meanwhile, petitioner appealed from the district court's permanent injunction order,[3] arguing that the order resolved a nonjusticiable political question, intruded on the prerogative of the Illinois legislature, and violated petitioner's ballot-access rights. Supp. App. 10a. On September 15, 2010, before the Seventh Circuit entered judgment on his appeal, Senator Burris filed his certiorari petition pursuant to this Court's Rule 11, which permits the Court to review cases "pending in a United States court of appeals, before judgment is entered in that court, * * * upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Petitioner also filed an application (No. 10A272) in this Court seeking an order staying enforcement of the district court's August 2, 2010 injunction. Supp. App. 9a. Justice Breyer, then-Circuit Justice for the Seventh Circuit, denied that application on September 20, 2010. Supp. App. 9a.

8. On September 24, 2010, the Seventh Circuit affirmed the district court's permanent injunction order. Supp. App. 1a-22a. The court first rejected

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[3] Governor Quinn also appealed, solely to preserve his right to relief should this Court grant his certiorari petition (No. 10-821) and reverse the Seventh Circuit's June 16, 2010 decision requiring a special election in the case of every Senate vacancy. The Seventh Circuit has stayed that appeal pending this Court's disposition of the Governor's certiorari petition.

petitioner's claim that the district court's injunction implicated a nonjusticiable, political question. Although the court was required to address this issue, even if forfeited, because it challenged the court's subject matter jurisdiction, the court found it meritless under the political-question analysis set forth in *Baker v. Carr*, 369 U.S. 186 (1962). See Supp. App. 10a-14a.

Next, the court rejected petitioner's claim that the district court's injunction intruded on the province of the Illinois General Assembly. This claim was forfeited, the Seventh Circuit held, because "[i]n the district court, Senator Burris was perfectly content with [that] court's power to fashion an order dictating what candidates would participate in the November 2 special election, so long as he was included among those candidates." Supp. App. 15a. The court elaborated:

> He asked the district court to implement a signature-gathering mechanism that would allow him to earn a place on the ballot; and, when that idea failed, he encouraged the court to add him to the ballot by virtue of the fact that he was the temporary appointee. Not once in the five hearings before the injunction issued did Senator Burris argue that the district court lacked the authority to establish a slate of candidates, and his written objections to the injunction * * * do not mention this point either. This court will not overturn an injunction based on an argument not presented to the district court, and there is no good reason to make an exception in this case, where Senator Burris took a position in the lower

> court that is the opposite of the one he advances here.

Supp. App. 15a-16a (citation omitted). Even if the court were willing to overlook petitioner's forfeiture, it made clear that the claim would fail on its merits. Indeed, the court observed that there are "countless other areas" where "federal courts have the power to issue remedial orders" involving matters generally committed to the States. Supp. App. 16a.

Finally, the court rejected petitioner's ballot-access challenge. Petitioner had failed to present this issue properly in his brief on appeal, "giv[ing] no indication about which provisions of the Constitution he [was] relying on or how his exclusion ha[d] caused the violation," in contravention of the Federal Rules of Appellate Procedure, which "require[] more than a generalized assertion of error." Supp. App. 18a (internal quotation marks omitted). And this claim failed on its merits, too, for "nothing in the permanent injunction exclude[d] a particular class or group of candidates in a manner that suggests that an identifiable group of voters will be left out of the special election," and, "more importantly, the district court's order [was] narrowly tailored to address only one occasion; it will have no effect on future elections in Illinois." Supp. App. 19a.

REASONS FOR DENYING THE PETITION

I. Senator Burris' Petition Does Not Provide A Vehicle For Reaching Any Of The Questions Presented.

There are insurmountable obstacles to this Court's review of each question presented in the petition. Not only did petitioner file his petition under this Court's Rule 11, which requires an extraordinary "showing that the case is of * * * imperative public importance," but this case is now moot as to him and, unlike the Governor, petitioner does not qualify for a mootness exception. Even if petitioner's claims were not moot, moreover, petitioner failed to preserve them below, at times taking positions in square conflict with arguments he seeks to advance in this Court.

A. This Case Is Moot, And Petitioner Does Not Qualify For The "Capable Of Repetition, Yet Evading Review" Exception To Mootness.

On November 2, 2010, Illinois voters elected then-Congressman Mark Kirk to serve as interim Senator for the remainder of President Obama's vacated Senate term and as Senator for the subsequent, six-year term. On November 29, 2010, Senator Kirk resigned his House seat and assumed President Obama's vacated Senate seat. See *supra* p. 5. Senator Kirk began as a full-term Senator on January 3, 2011. Because both the 2010 general election and President Obama's vacated Senate term are over, petitioner no longer has a stake in the outcome of this case. Certiorari should be denied on this ground alone.

1. "The Constitution's case-or-controversy limitation on federal judicial authority, Art III, § 2, underpins * * * [this Court's] mootness jurisprudence." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000). "Article III denies federal courts the power 'to decide questions that cannot affect the rights of litigants in the case before them.'" *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)). And the "'case-or-controversy requirement subsists through all stages of federal judicial proceedings. * * * [I]t is not enough that a dispute was very much alive when suit was filed.'" *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 461-462 (2007) (quoting *Lewis*, 494 U.S. at 477) (internal alterations in original); accord *Davis v. FEC*, 554 U.S. 724, 732-733 (2008) ("'To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'") (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997)). "The parties must continue to have a 'personal stake in the outcome' of the lawsuit" for the suit to remain justiciable. *Lewis*, 494 U.S. at 478 (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983)). Petitioner's stake in this case expired when President Obama's Senate term expired. Petitioner cannot, and does not, ask this Court to change his status in any way.

2. Nor can petitioner satisfy the "'exception to mootness for disputes capable of repetition, yet evading review.'" *Davis*, 554 U.S. at 735 (quoting *Wisc. Right to Life*, 551 U.S. at 462). This exception is satisfied only

"'where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.'" *Ibid.* The "second prong" of this "exception requires a 'reasonable expectation' or a 'demonstrated probability' that 'the same controversy will recur involving the same complaining party.'" *Wisc. Right to Life*, 551 U.S. at 463 (quoting *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (*per curiam*)). And unlike the Governor, petitioner cannot satisfy this second element.

In the election context, a complaining party may meet the second element by asserting that he or she plans to participate in future elections and thus will again be subject to the challenged law. *See Davis*, 554 U.S. at 736 (challenge to self-financing provisions of federal campaign finance law not mooted by election's conclusion because plaintiff "made a public statement expressing his intent" "to self-finance another bid for a House seat"); *Wisc. Right to Life*, 551 U.S. at 463 (same regarding challenge to advertising restrictions in federal campaign finance law where plaintiff "credibly claimed that it planned on running 'materially similar' * * * broadcast ads" in future election); *Chandler v. Miller*, 520 U.S. 305, 313 n.2 (1997) (election case not moot because plaintiff "represented, as an officer of this Court, that he plans to run again"); *Norman v. Reed*, 502 U.S. 279, 287-288 (1992) (same because "[t]here would be every reason to expect the same parties to generate a similar, future controversy"); *Int'l Org. of Masters, Mates & Pilots v. Brown*, 498 U.S. 466, 473 (1991) (same because "[r]espondent has run for office

before and may do so again"); see also *Ill. State Bd. of Elec. v. Socialist Workers Party*, 440 U.S. 173, 187-188 (1979) (in case challenging certain actions by state board of elections, holding that case was mooted by election's completion because there was "no evidence creating a reasonable expectation that the [board of elections] will repeat its purportedly unauthorized actions in subsequent elections").

Further, the Court has looked past the same-complaining-party requirement where a plaintiff sought class-wide relief. Compare *Brockington v. Rhodes*, 396 U.S. 41, 43 (1969) (*per curiam*) (election's completion mooted ballot-access challenge because plaintiff did not allege "he intended to run for office in any future election" and "did not attempt to maintain a class action on behalf of himself and other putative independent candidates"), with *Richardson v. Ramirez*, 418 U.S. 24, 39-40 (1974) (challenge to felon disenfranchisement law not mooted by clerk's decision to register named plaintiffs because "remaining members of the class" had not obtained relief); *Rosario v. Rockefeller*, 410 U.S. 752, 755-756 & nn.4-5 (1973) (class-action challenge to voting eligibility requirement not mooted by named plaintiff becoming eligible to vote); and *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1972) (same).

But petitioner does not purport to represent a class of would-be future Senate appointees, and he does not (and cannot) claim that any of the questions the petition poses are reasonably likely to affects his interests in a future case. The first and third questions—which challenge the district court's decision limiting the

candidates on the special election ballot to those running for the six-year term—are not "capable of repetition" at all. As the Seventh Circuit recognized, the district court's slating of the special election candidates was necessary because, by the time the appellate court issued its opinions ordering the special election (on June 16, 2010) and denying rehearing (on July 22, 2010), the November 2, 2010 election was "fast approaching," and state election authorities had little time to conduct a "manageable election." Supp. App. 2a; see also Supp. App. 20a (describing district court's slating order as "the most democratic and constitutionally sound approach" available "to supply a remedy in an expeditious fashion"). Under these circumstances, the district court had to weigh the competing concerns of the parties, potential candidates, and the public in crafting a prompt, equitable remedy that gave effect to the Seventh Circuit's unprecedented new construction of the Seventeenth Amendment. See Supp. App. 21a-22a; see also *Hecht Co. v. Bowles*, 321 U.S. 321, 329-330 (1944) (describing nature of court's equitable jurisdiction). As the appellate court noted, the district court entered a "narrowly tailored" order to address this "one occasion," and that order "will have no effect on future elections" and thus presents no recurring issue. Supp. App. 19a.

Finally, as for petitioner's second question, which seeks review of the Seventh Circuit's holding that a special election is necessary even when the Senate term expires naturally following the next general election, petitioner has not asserted any reasonable expectation that "the same controversy will recur" in a case

involving him as "the same complaining party." Nor could petitioner credibly forward such a claim. There is no likelihood (much less a reasonable expectation) that petitioner will again be appointed to serve out the final third of a Senate vacancy, and thus no likelihood that petitioner will face the prospect of a special election to fill that vacancy.

In short, all of petitioner's claims are moot, and he cannot qualify for a mootness exception. The petition should be denied on this ground alone.

B. Petitioner Has Not Preserved, And Has Even Disavowed, The Claims In His Certiorari Petition.

Petitioners' claims are not only moot, but they suffer from other defects as well, making this petition the wrong vehicle for reaching any of the three questions presented. Following the Seventh Circuit's June 16, 2010 decision, petitioner informed the district court that he had no objection to the court of appeals' reading of the Seventeenth Amendment, so long as the district court afforded petitioner a chance to run in the special Senate election. This position is in square conflict with points now raised in the petition.

1. The second question presented challenges the Seventh Circuit's ruling that States must hold a special election for every Senate vacancy, but petitioner's counsel took the contrary review below, where he represented that he did not "oppose the result from the

7th Circuit." 7/26/10 Tr. at 12-13.[4] Indeed, even though the district court encouraged the Governor and petitioner, specifically, to seek reconsideration or clarification from the Seventh Circuit following that court's June 16, 2010 decision, see 6/23/10 Tr. at 12, 17, only Governor Quinn did so. Nor did petitioner file a certiorari petition seeking review of that decision, as the Governor has, and when petitioner appealed from the

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When petitioner first moved to file a brief *amicus curiae* in the district court, see *supra* p. 3, he did so to advance a theory that the Governor had not—that this Court's decision in *Foster v. Love*, 522 U.S. 67 (1997), was "dispositive" of plaintiffs' request for a prompt special election. Mot. of Sen. Burris to Appear as *Amicus Curiae* at 2. *Foster* relied upon federal law setting Congressional election dates to void a Louisiana statute that enabled voters to elect members of Congress in "open primaries" held prior to those federally scheduled dates. 522 U.S. at 69-73. Senator Burris' claim was that, following *Foster*, "Governor Quinn cannot order a special election before" November 2, 2010, the next federally scheduled date for the election of U.S. Senators. Br. *Amicus Curiae* of Sen. Burris at 3. While the district court properly rejected this claim, Pet. App. 49a-52a, and the Seventh Circuit never reached it, Pet. App. 44a, it is noteworthy that petitioner's reliance on *Foster* is not inconsistent with the Seventh Circuit's decision requiring two Senate elections on November 2, 2010. See, *e.g.*, Pet. of Sen. Burris for Writ of Mandamus (7th Cir.), at 2 ("Senator Burris submitted an amicus brief suggesting that the special election could only be held on November 2, 2010, Federal election day.").

district court's August 2, 2010 injunction—the appeal that forms the basis for this certiorari petition—he again failed to raise any objection to the Seventh Circuit's June 16, 2010 decision.

Rather, as petitioner has repeatedly conceded, his interest in the case following the Seventh Circuit's decision arose only when the district court began discussions about which candidates to include on the ballot for the special Senate election. Petitioner's counsel indicated that he did not "think that we really had a dog in this fight" until the court began "talking about fashioning a remedy that provides for certain candidates to be on the ballot." 6/30/10 Tr. at 22. And although he did not "oppose the result from the [Seventh] Circuit," he had "some concerns about the details of [the] injunction order" that the parties were discussing—namely, the proposed use of the candidate list for the full, six-year term on the special election ballot, a list that excluded petitioner and others who had not filed to run as candidates for the full term. 7/26/10 Tr. at 12-13; see also Appellant's Br. of Sen. Burris (7th Cir., No. 10-2836) at 13 ("When it became clear that the injunction might block Senator Burris, the incumbent, from running to finish out the term, Senator Burris asked the court for leave to brief his views on the constitutionality of the proposed injunction."); Pet. of Sen. Burris for Writ of Mandamus (7th Cir.), at 10 n.21 (same). Consistent with petitioner's limited interest in the case, moreover, his counsel has asked the district court to excuse him from future proceedings in that court on plaintiffs' remaining

challenges to Illinois' Senator-replacement law. See 7/29/10 Tr. at 40.

Thus, while petitioner contends that he endorsed the Governor's argument below when, during the first of the district court's five hearings on remand, petitioner's counsel "'agree[d]'" with and "'strongly support[ed] the position of the Attorney General,'" Supp. Pet. 6 (quoting 6/23/10 Tr. at 12), this ignores the later representation by petitioner's counsel that he did not oppose the Seventh Circuit's decision, and his concession that he was concerned solely with the list of candidates for the special election. Accordingly, petitioner may not proceed in this Court on the second question presented. See *U.S. v. Galletti*, 541 U.S. 114, 120 n.2 (2004) (party forfeited argument by failing to raise it in court below and instead taking contrary position).

2. Petitioner's position below also complicates, if not forecloses, his position on questions one and three. As the Seventh Circuit held, petitioner did not oppose the notion that the district court would decide who would appear on the ballot. He first encouraged the court to implement "some type of abbreviated petition drive" for the special Senate election. 7/26/10 Tr. at 18; see Supp. App. 7a. Next, he supported the idea of the court's adding his name, alone, to the list of candidates from the full-term election on the special election ballot. Supp. App. 7a; 7/26/10 Tr. at 23, 25 (petitioner's counsel: "I don't think anybody opposes that" proposal, and "we would find that to be agreeable"); 7/29/10 at 14 ("There is no more confusion by adding Senator Burris' name to one of those elections for the special term than

we would have by virtue of having two elections."). These arguments are impossible to square with petitioner's current claim that the district court had no authority to decide how to select names for the ballot (the petition's first question presented), as the Seventh Circuit held. See Supp. App. 15a-16a. And petitioner's request to add his name alone to the special election slate cannot be reconciled with his current ballot-access claim (the petition's third question presented), which seeks broad access for would-be candidates.

* * *

At best, even if petitioner could somehow overcome mootness, his legal positions in the district court following the Seventh Circuit's June 16, 2010 decision would complicate proceedings in this Court dramatically. Plaintiffs are sure to argue that petitioner has forfeited his current claims, as plaintiffs have already done in the Seventh Circuit and in opposition to petitioner's emergency application in this Court. See Plaintiffs-Appellees' Br. (7th Cir., No. 10-2836), at 4-5 ("In contrast" to "the Governor," "[a]t no time in the ensuing and extensive [post-remand] district court proceedings, which included five hearings between June 16 and July 29, did [Senator] Burris ever object to the district court's exercising its power to determine the mechanics of the election."); *id.* at 7-10; Plaintiffs' Br. in Opposition to Sen. Burris' Emergency Application (U.S., No. 10A272) at 4-11. Accordingly, this petition is a poor vehicle for reaching any of the questions presented.

II. Questions One And Three Are Not Otherwise Worthy Of Certiorari Review.

Although this petition does not offer a vehicle for resolving the second question presented, the Governor agrees that this question warrants Supreme Court review, and the Governor's certiorari petition, devoted entirely to this issue, is currently pending. Even absent mootness and forfeiture, however, the petition's first and third questions, which address the implementation of the special election in the unique circumstances of this case, see Pet. i, 12-16, 20-24, lack merit and are not worthy of certiorari review.

1. To start, petitioner identifies no split in authority as to either question, and the fact-dependent nature of these claims make inter-court conflicts impossible. In both the first and third questions, petitioner challenges the district court's manner of ordering the special election under a singular set of circumstances. See *supra* pp. 12-13. Because the injunction that petitioner challenges is limited in scope to the particular, unusual facts of this now-past special election, certiorari is unwarranted.

2.a. Petitioner's legal arguments in support of questions one and three also lack merit. The former asserts that the Seventeenth Amendment precludes a federal court from selecting candidates for a special Senate election. Pet. 12-16. And, to be sure, the Amendment authorizes state legislatures to direct the manner of holding these elections. But this ignores the more fundamental point that, once a violation of a constitutional right has been established, the court may

remedy that violation. The "jurisdictional grant" in 28 U.S.C. § 1331 "provides not only the authority to decide whether a cause of action is stated by a plaintiff's claim that he has been injured by a violation of the Constitution * * * but also the authority to choose among available judicial remedies in order to vindicate constitutional rights." *Bush v. Lucas*, 462 U.S. 367, 374 (1983) (internal citations omitted). Indeed, "it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution," and federal courts have the authority "to adjust their remedies so as to grant the necessary relief" to remedy a constitutional violation. *Bell v. Hood*, 327 U.S. 678, 684 (1946); see *Smith v. Robinson*, 468 U.S. 992, 1012 n.15 (1984). And as the Seventh Circuit recognized, the court's authority to remedy constitutional violations extends to matters traditionally within a State's control, such as taxation and the creation of school districts. See Supp. App. 13a-14a, 16a-17a (collecting cases). In short, the district court had the authority to remedy what the Seventh Circuit concluded was a violation of plaintiffs' Seventeenth Amendment rights.

Nor did the district court exceed this authority. "A remedy is justifiable * * * insofar as it advances the ultimate objective of alleviating the initial constitutional violation." *Freeman v. Pitts*, 503 U.S. 467, 489 (1992). The district court fashioned its relief to alleviate the purported Seventeenth Amendment violation that the Seventh Circuit identified in failing to hold a separate, special election for the remaining weeks of President Obama's Senate term.

Petitioner's reliance on *Newberry v. U.S.*, 256 U.S. 232 (1921), see Pet. 13-14, is misplaced. The plurality in that case held that Congress has no "indefinite, undefined power over elections for Senators and Representatives," 256 U.S. at 249, and no authority "to control party primaries or conventions for designating candidates," *id.* at 258. *Newberry* is silent, however, on the issue presented here: whether the district court's authority to remedy a constitutional violation includes fashioning the means to conduct an election.

b. The petition's third question also lacks merit. Here, petitioner asserts that his constitutional rights were violated because the district court's injunction left him and other would-be candidates off the special election ballot. "'[A]s a practical matter,'" however, "'there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). Indeed, if a State were required to put everyone on the ballot who so desired, "then ballots would be the size of telephone books." *Protect Marriage Ill. v. Orr*, 463 F.3d 604, 607-608 (7th Cir. 2006).

To determine whether a ballot-access restriction violates the First or Fourteenth Amendment, the court weighs the severity of the restriction on the right to vote against the interests served. See *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). The focus is on the interests of the voters. See *Anderson*, 460 U.S. at 806. Here, the district court, with very little time remaining before finalizing the ballot, reasonably limited the list of

special-election candidates to those who had already satisfied the public-support and other eligibility requirements to run for the full, six-year Senate term. Pet. App. 70a-71a.

Among other benefits, it was reasonable for the district court to conclude that using the same list for both elections would minimize voter confusion. See *Am. Party of Tex. v. White*, 415 U.S. 767, 782 & n.14 (1974) (limiting candidates to those demonstrating sufficient public support serves "compelling" state interest in minimizing voter confusion). And the limited time remaining before the general election made other options—additional primary elections, party conventions, or petition drives—impractical, as the Seventh Circuit held. See Supp. App. 20a. Under the circumstances, the district court's practical solution to a unique and challenging set of circumstances was not an abuse of the court's equitable discretion. See *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 381 (2008).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The
Supreme Court of the United States

ROLAND WALLACE BURRIS, U.S. SENATOR,

Petitioner,

v.

GERALD ANTHONY JUDGE, et al.,

Respondents.

On Petition For A Prejudgment Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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I. Introduction

The United States Court of Appeals for the Seventh Circuit has just issued the third in a trilogy of decisions construing the Seventeenth Amendment to require Illinois to hold a special election for President Barack Obama's Senate seat and empowering the district court to dictate the mechanics of that election.[1] Senator Roland W. Burris, who former Illinois Governor Rod Blagojevich appointed to fill the seat, has petitioned for a writ of certiorari before judgment to review a permanent injunction issued by the United States District Court for the Northern District of Illinois that prevents Senator Burris from running in the election. Senator Burris now supplements his petition because the Seventh Circuit's latest decision affirmed the district court's injunction restricting the special election to those candidates already qualified to run in the general election scheduled the same day for the next full Senate term.

It is ironic that the Seventh Circuit justifies one violation of the Seventeenth Amendment to rectify another. The framers of the Amendment clearly contemplated that any Senate vacancy filled by election would be "as the legislature may direct" – the elected body of the citizenry – rather than a single federal judge. And, as to the principal issue here,

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[1] *Judge v. Quinn*, 612 F.3d 537 (7th Cir. 2010) ("*Judge I*"); *Judge v. Quinn*, 2010 WL 2853645 (7th Cir. July 22, 2010) (unpublished order) ("*Judge II*"); *Judge v. Burris, et. al.*, No. 10-2836 (7th Cir. September 24, 2010) ("*Judge III*").

blocking access to the ballot, the district court did not need to usurp the role of the Illinois General Assembly by defining the candidate pool as Illinois law already provides an alternative means that no party claimed is unconstitutional and, indeed, satisfied the plaintiffs who were pursuing the injunction.[2]

II. Impact of the Seventh Circuit Decision on the Petition

The district court's permanent injunction order and the Seventh Circuit's trilogy of *Judge* decisions are built upon a false dilemma – that judicial intervention is necessary to avert a constitutional crisis created by inaction on the part of the Illinois General Assembly, a body never a party to this litigation. Both courts acknowledge that the Seventeenth Amendment to the U.S. Constitution empowers the General Assembly to direct the mechanics of any election to fill a vacancy in the U.S. Senate. Yet, their decisions presume inaction where none has occurred to justify court-ordered intervention into the election process.

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[2] Plaintiffs' proposed permanent injunction order cited to an Illinois statute prescribing the candidate selection process for vacancy elections: "The Court also finds that selecting nominees by political parties to be candidates for the U.S. Senate at the special election to be held on November 2, 2010 pursuant to the vacancy provisions of 10 ILCS §5/7-61 . . . is the most appropriate manner for the selection of the nominees[.]"

Intervention was unnecessary under this Court's prior rulings in *Valenti v. Rockefeller*, 393 U.S. 405, 89 S.Ct. 689, 21 L.Ed.2d 635 (1969) and *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 10-11, 102 S.Ct. 2194, 72 L.Ed.2d 628 (1982). In *Valenti*, this Court sustained the authority of the New York Governor to fill a Senate vacancy for over 29 months by appointment, permitting the appointee to serve the remainder of the term without a special election. In *Rodriguez*, the Court noted "that the Seventeenth Amendment permits a State, if it chooses, to forgo a special election in favor of a temporary appointment to the United States Senate[.]" *Rodriguez*, 457 U.S. at 11.[3]

In any event, the Seventeenth Amendment mandates that state legislatures, not the federal judiciary, prescribe the mechanics of any vacancy election: "the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election *as the legislature may direct.*" (Emphasis added.) Despite acknowledging this power of the General Assembly in *Judge I*, 612 F.3d at 554-55, the Seventh Circuit endorsed the district court's usurpation of that power in *Judge III*. The appellate court explained that

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[3] Even the Seventh Circuit itself in *Lynch v. Illinois State Board of Elections* construed *Valenti* and Rodriguez to "sustain the authority to fill vacancies in elective offices by appointment, even though the appointee will hold office for the duration of the term." 682 F.2d 93, 96 (7th Cir. 1982).

"[o]nce a constitutional violation has been proven, federal courts have the power to issue remedial orders tailored to the scope of the constitutional violation." *Judge III*, slip op. at 12. Neither the district court nor appellate court, however, has identified any constitutional violation by the General Assembly justifying the district court's interference with its Seventeenth Amendment duty to direct the special election. Instead, the Seventh Circuit presumed that Governor Quinn's failure to issue a writ of election warranted the district court's interference in the electoral process through the injunction even after the Governor issued a writ.[4]

As the events in Illinois transpired, the State of West Virginia faced a vacancy in its Senate delegation when Senator Robert Byrd died on June 28, 2010. *Within three weeks*, the West Virginia Legislature defined election procedures for a special election to coincide with Federal Election Day on November 2nd to fill the vacancy. The Special Election Bill establishes a special primary for political parties and

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[4] Under Fed.R.Civ.P. 65(d)(2), an injunction may only bind "(A) the parties; (B) the parties' officers, agents, servants, employees, and attorneys; and (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B)." The district court implemented its order by serving Illinois State Board of Elections and the Illinois Secretary of State pursuant to this rule without identifying which subsection applied. Neither the Board nor Secretary of State, of course, played any role in preventing the Governor from issuing a writ of election.

allows independent candidates to run that file a petition with sufficient signatures and pay a filing fee. Unlike the district court's process here, the West Virginia Legislature thus opened the special election for the Senate vacancy to candidates not already prequalified.

Similarly, the Illinois General Assembly must first be given the opportunity to exercise its own judgment in fulfilling its constitutional responsibilities. The federal courts may only intervene after the legislature has acted or failed to act in a manner that is not consistent with the Constitution. Until then, the Constitution does not permit the preemptive judicial interference embodied in the district court's permanent injunction order and sanctioned by the appeals court.

III. Senator Burris Did Not Waive His Argument

The Seventh Circuit contends that Senator Burris waived his principal argument that the district court usurped the constitutional role of the Illinois General Assembly when it decided how candidates should be selected for the special election. *Judge III*, slip op. at 11. Traditionally, this Court will grant certiorari only when a question presented was pressed by the petitioner or passed upon by the courts below. *United States v. Williams*, 504 U.S. 36, 41, 112 S.Ct. 1735, 1738-1739, 118 L.Ed.2d 352 (1992). At the earliest practical time, Senator Burris asserted his

claim, and the district court rejected it, thus satisfying the "press or pass" requirement.

In *Judge III*, the Seventh Circuit maintained that Senator Burris only questioned the district court's power to dictate the candidates in the special election so long as he was not one of them. *Judge III*, slip op. at 11-12. This is simply not true. Immediately after remand, Senator Burris joined with Governor Quinn to question the district court's power to define the candidates for the vacancy election. In the first post-remand hearing, after plaintiffs had moved for a permanent injunction, the Governor's counsel pointed out that "we can't just override the Illinois Election Code by fiat. We can't do that. We can't just decide who goes on the election." Transcript of Proceedings of June 23, 2010 at p. 10. When he spoke, Senator Burris' counsel said, "I agree, your Honor, and on behalf of Senator Burris, we strongly support the position of the Attorney General. We think it's the appropriate position." *Id.* at p. 12. Governor Quinn's counsel then expanded on his argument, an argument that Senator Burris endorsed then and asserts now:

> *The Constitution itself says that the conduct of elections is regulated by the states . . . and maybe people in the State of Illinois want to vote for one person for the 60-day term and a different person for the six-year term. So we don't want to have a sham election where it's the same people. Who decided that by fiat,*

> *that it should be exactly the same people?* (Emphasis added.)

Id. at 25-26.

This, of course, is precisely the argument that Senator Burris advances in this petition for certiorari. For Senator Burris to continue asserting his position would have been fruitless because the Seventh Circuit soon issued *Judge II*, effectively ordering the district court to define the mechanics of the special election. *Judge II*, 2010 WL 2853645, at *1.

Afterwards, as the district court defined the mechanics of the special election in the two hearings that followed, Senator Burris did not simply promote his own interests by advocating that adding him to the ballot would satisfy the Constitution. To the contrary, at both hearings where the issue was discussed after *Judge II*, his counsel insisted that all interested candidates must be entitled to seek nomination. Indeed, until the final hearing, the district court was leaning toward a resolution that plaintiffs had earlier proposed based upon 10 ILCS §5/7-61 of the Illinois Election Code.

Four days after expressing this preference, the district court issued its permanent injunction, which ignored the Illinois statute by restricting the candidates for the vacancy election to those already qualified for the general election. Under the circumstances, Senator Burris did all that he could do to preserve his position on appeal, both as to the district court's usurpation of the legislature's constitutional

power to define the special election and the unconstitutional denial of ballot access to all candidates besides those already qualified for the general election.

More to the point, as the hearing excerpts establish, Senator Burris pressed these issues before the district court and the court passed on them when it issued an injunction that ignored the Illinois Election Code to block Senator Burris and other interested candidates from participating in the special election for the seat that the Senator now holds.

IV. Conclusion

For the foregoing reasons and those in Senator Burris' original petition, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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In the
United States Court of Appeals
For the Seventh Circuit

No. 10-2836

GERALD A. JUDGE and
DAVID KINDLER,

Plaintiffs-Appellees,

v.

PAT QUINN, Governor of
the State of Illinois,

Defendant,

and

ROLAND W. BURRIS, U.S. Senator,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 09 C 1231 – **John F. Grady**, *Judge.*

SUBMITTED SEPTEMBER 22, 2010* –
DECIDED SEPTEMBER 24, 2010**

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* After an examination of the briefs and the record, we have concluded that oral argument is unnecessary. Thus the appeal is submitted on the briefs and the record. FED. R. APP. P. 34(a)(2).

** This opinion is being issued in typescript; printed version to follow.

Before ROVNER, WOOD, and TINDER, *Circuit Judges*.

WOOD, *Circuit Judge*. In this appeal, Senator Roland Burris challenges a permanent injunction entered by the district court after our decision in *Judge v. Quinn*, 612 F.3d 537 (7th Cir. 2010) ("*Judge I*"). That injunction states that the State of Illinois will hold a special election on November 2, 2010. In that election, the people of Illinois will select a permanent replacement to fill President Barack Obama's seat in the U.S. Senate for the remainder of the 111th Congress. Because November 2 is fast approaching and in the interest of a manageable election, the district court limited the candidates who will appear on the ballot for the special election to those people who are slated to appear on the November 2 ballot in the general election to fill the six-year Senate term that will begin at the start of the 112th Congress. One practical effect of this limitation was to prevent Senator Burris, who was appointed to serve as President Obama's temporary replacement in the Senate, from participating in the special election. In this appeal, Senator Burris asks us to vacate the district court's permanent injunction. We conclude that the lower court acted well within its discretion, and we affirm its order.

I

We will assume familiarity with our earlier opinion, which described the background of this case, and so we address here only the facts necessary to

resolve this successive appeal. On June 16, 2010, we affirmed the district court's decision to deny a preliminary injunction to two Illinois voters who claimed that the Seventeenth Amendment required Pat Quinn, the Governor of Illinois, to issue a writ calling for a special election to select a permanent replacement for President Obama's former seat in the Senate. *Judge I, supra.*

Our analysis of the Seventeenth Amendment led to the conclusion that a state must hold an election each time that a vacancy occurs in its Senate delegation, so that the people of the state can elect a replacement senator. To ensure that such an election takes place, the executive officer of the state is required by the Constitution to issue a writ of election. The timing and mechanics of the special election are governed by state law, as contemplated by the Elections Clause of the Constitution and the final phrase of the Seventeenth Amendment's second paragraph. Finally, the Seventeenth Amendment permits the state legislature to empower the state executive to fill a Senate vacancy temporarily by appointment, until a special election takes place. *Judge I,* 612 F.3d at 554-55. At the time of the plaintiffs' initial appeal in this case, Governor Quinn had not issued a writ of election, and the State of Illinois took the position that Senator Burris was to serve as President Obama's replacement in the Senate until January 3, 2011. They maintained this position despite the fact that then-Governor Blagojevich's certificate appointing Senator Burris made clear that his tenure in the

Senate was to last only "until the vacancy . . . is filled by election as provided by law." Accordingly, we concluded that the plaintiffs had a strong likelihood of success on the merits of their constitutional claim.

Ultimately, however, we decided that preliminary relief was not warranted because the plaintiffs failed to identify any irreparable harm that they might suffer in the absence of immediate equitable relief. We noted there was still ample time during which Governor Quinn might issue a writ of election, and we felt confident that the district court would resolve the merits of the plaintiffs' claim in a timely fashion. Because the issue was not presented in the plaintiffs' appeal, we declined to address how the state was to decide what names should appear on the ballot for the special election. We did suggest, however, that the state might propose a solution acceptable to all parties. *Judge I*, 612 F.3d at 556-57.

Following our decision, the plaintiffs asked the district court to enter a permanent injunction ordering Governor Quinn to issue a writ of election that would call for a special election on November 2, 2010, the date specified by the Illinois Election Code, 10 ILCS 5/25-8 (West 2010). On June 23, 2010, the district court held the first of five hearings to consider the plaintiffs' request. Lawyers for the plaintiffs, Governor Quinn, and Senator Burris were present. Governor Quinn opposed the injunction, saying that a second election on November 2 would cause voter confusion, that there was too little time to prepare, and that the Illinois Election Code failed to outline

any method for selecting candidates to participate. Senator Burris joined the governor's opposition. In response, the plaintiffs proposed a number of potential solutions to the purported timing and candidate-selection problems. The district court postponed its decision while Governor Quinn filed a petition in this court for rehearing.

On June 28, 2010, Governor Quinn filed his petition for rehearing and rehearing *en banc*. Among other arguments, he again asserted that it would be impossible for Illinois to prepare for a special election in compliance with the Illinois Election Code in the time remaining before November 2. The plaintiffs filed an expedited response, explaining that a November 2 special election was feasible if the state overrode the normal primary system for selecting candidates for the ballot and used a more expeditious method. We denied rehearing on July 22, at which point we amended our initial decision to make clear that

> [t]he district court has the power to order the state to take steps to bring its election procedures into compliance with rights guaranteed by the federal Constitution, even if the order requires the state to disregard provisions of state law that otherwise might ordinarily apply to cause delay or prevent action entirely. . . . To the extent that Illinois law makes compliance with a provision of the

> federal Constitution difficult or impossible, it is Illinois law that must yield.

Judge v. Quinn, 2010 WL 2853645, at *1 (7th Cir. July 22, 2010) (unpublished order) ("*Judge II*").

Four days after that order, the district court held its fourth hearing to consider the permanent injunction. Abandoning his earlier position, Governor Quinn there acknowledged that a special election was possible. This meant that all of the parties then agreed that a primary was unnecessary. Governor Quinn proposed that the court disregard the requirements of the Illinois Election Code and limit the special election ballot to candidates who had been selected in primaries (or had collected the requisite number of signatures) and were set to appear on the November 2 general election ballot for the new, six-year Senate term. That precise procedure, the parties agreed, had been used in Illinois to select candidates for a special election to the U.S. House of Representatives following our decision in *Jackson v. Ogilvie*, 426 F.2d 1333 (7th Cir. 1970). *See Vote Set for House Vacancy*, Chicago Tribune, July 28, 1970, at 3. While the plaintiffs initially put forward a plan under which the central committees of the state's political parties would choose candidates for the special election, in accordance with the vacancy provisions of the Illinois Election Code, they made clear that they did not object to the governor's plan.

Senator Burris, however, was not satisfied. He opposed any plan that would leave him (or other

interested citizens, he said) off the special election ballot. He proposed that the district court enter an injunction providing that parties who collected a limited number of signatures would also be entitled to appear on the ballot for the special election. Governor Quinn urged the court to reject that idea, arguing that an entirely novel qualifying procedure would be much too complicated to implement in the short time that remained. In response, the district court asked the parties whether they would object to its ordering that Senator Burris should be included on the special election ballot by fiat. Senator Burris supported that proposal. But the plaintiffs noted that Senator Burris's appointment to the Senate did not give him a special claim to a spot on the ballot over any other citizen, and Governor Quinn added that the presence of Senator Burris on the list of special election candidates might cause confusion among voters if he was then absent from the list of general election candidates on the same ballot. As the hearing closed, the district judge asked Governor Quinn and the plaintiffs to return later that week with a draft injunction order. Senator Burris, still objecting to his potential exclusion, asked to submit a brief in opposition to any order, to which the court responded, "I don't need any briefs on this. But I will hear you fully when we have an order. . . . [D]on't be afraid that you won't have an opportunity to be heard."

On July 29, the district court held its fifth and final hearing. Governor Quinn and the plaintiffs arrived having reached agreement on the contours of

a permanent injunction order. After a discussion about how long the state would have to certify election results, the court asked Senator Burris's attorney what right Senator Burris had to be placed on the special election ballot as opposed to any other person. The attorney responded, "I don't know that Senator Burris is suggesting that there is a right outside of the right that should be afforded to any person to have ballot access. He believes that to be a constitutional right." Senator Burris also submitted a brief in opposition to the permanent injunction, in which he argued that the district court had denied him the opportunity to be heard and threatened to violate his right to access the ballot by issuing an injunction.

The district judge decided it would adopt Governor Quinn's proposal, restricting the special election ballot to those candidates slated to run in the general election. At the same time, in Springfield, Illinois, Governor Quinn issued a writ of election. He commanded the clerks in each county "to cause a SPECIAL ELECTION to permanently fill [President Obama's vacancy] for the remainder of Hon. Obama's term to be held in the STATE OF ILLINOIS on TUESDAY, NOVEMBER 2, 2010 in conformity with any applicable federal court orders and, to the extent feasible, with the Illinois Election Code. . . ."

On August 4, 2010, the district court entered its preliminary injunction order. In the order, the district court confirmed that the Illinois Election Code established November 2 as the date for a special election, and it found that the writ of election issued

by Governor Quinn complied with the federal Constitution and Illinois law. In addition, the district court noted that it had conducted five separate hearings "to consider procedures for conducting a special election on short notice," and it recognized that "to the extent that Illinois law makes compliance with a provision of the federal Constitution difficult or impossible, it is Illinois law that must yield to the extent that it otherwise might apply to cause delay or prevent action entirely." *See Judge II*. Noting that a primary election was not necessary and that candidates had to be limited to a manageable number, the court entered its order adopting Governor Quinn's candidate-selection plan. Senator Burris's appeal followed.[1]

II

We review a district court's entry of a permanent injunction for an abuse of discretion. *e360 Insight v. The Spamhaus Project*, 500 F.3d 594, 603 (7th Cir. 2007). In an election law case, "[t]he essential question . . . is whether the District Court properly

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[1] On September 3, 2010, Senator Burris filed a Motion for Stay of District Court Order and a Petition for a Writ of Mandamus in this court. Both of these represented efforts to prevent the district court's injunction from taking effect. This court denied both the motion and the petition on September 8, 2010, at which time we expedited this appeal. Senator Burris also filed an Application (No. 10A272) with Justice Breyer, in his capacity as Circuit Justice for the Seventh Circuit, seeking a stay of enforcement of the district court's judgment. On September 20, 2010, Justice Breyer denied the Application.

exercised its equitable discretion in reconciling the requirements of the Constitution with the goals of state political policy." *Connor v. Finch*, 431 U.S. 407, 414 (1977).

Senator Burris's principal contention in this appeal is that the district court lacked the power to enter a permanent injunction defining the mechanics of the November 2 special election. This argument is split into two closely related branches: first, the senator claims that the lower court's order concerns a nonjusticiable political question; and second, he asserts that the injunction invades the exclusive province of the Illinois state legislature, in violation of the Elections Clause and the Seventeenth Amendment. In addition to these arguments, Senator Burris takes the position that the permanent injunction interferes with his constitutional right of access to the ballot.

A

We begin with the political-question argument, for if this case presents an issue that falls within the scope of that doctrine, then we lack authority to adjudicate it. *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) (citing *Luther v. Borden*, 7 How. 1 (1849)). Contrary to the plaintiffs' suggestion, it makes no difference whether Senator Burris raised this argument before the district court; it affects our jurisdiction and cannot be forfeited.

The political-question doctrine "identifies a class of questions that either are not amenable to judicial resolution because the relevant considerations are beyond the courts' capacity to gather and weigh, . . . or have been committed by the Constitution to the exclusive, unreviewable discretion of the executive and/or legislative – the so-called 'political' – branches of the federal government." *Miami Nation of Indians of Indiana, Inc. v. U.S. Dept. of the Interior*, 255 F.3d 342, 347 (7th Cir. 2001). The Supreme Court's decision in *Baker v. Carr* sets out the now-familiar factors that, if present, suggest that a political question exists:

> [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. 186, 217 (1962). Importantly, the *Baker* Court added that "[t]he doctrine . . . is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy

as to whether some action denominated 'political' exceeds constitutional authority." *Id.* Senator Burris suggests that several of the considerations *Baker v. Carr* identified as tending to reveal a political question are present in his case. In our view, however, the only ones that require closer attention are whether there is a lack of judicially manageable standards for implementing the special election or if the conduct of that election is entirely committed to the political branches.

With respect to the first of those issues, both history and constitutional text show that this case is not one where reasonable people might disagree about the availability of judicially manageable standards. But compare *Vieth v. Jubelirer*, 541 U.S. 267 (2004), and *Davis v. Bandemer*, 478 U.S. 109 (1986). The Seventeenth Amendment supplies a concrete rule requiring an election to fill each Senate vacancy. The district court turned to state law, past practice in Illinois, and recent primary election results to establish the timing of the required special election and a fair slate of candidates to participate. Nothing that the court did in order to bring Illinois's election procedures into line with the Seventeenth Amendment was beyond its capacity.

Similarly, this case does not involve an issue committed to the exclusive discretion of one of the political branches. Senator Burris takes the view that, because the Constitution commits to the Illinois legislature the job of defining the mechanics of a vacancy election, the federal district court has no

institutional role to play. But a long line of decisions from the Supreme Court demonstrate that he is wrong. The Court has said that "[w]hen challenges to state action respecting matters of the administration of the affairs of the State and the officers through whom they are conducted have rested on claims of constitutional deprivation which are amenable to judicial correction," federal courts may act to address the merits of those claims. *Baker*, 369 U.S. at 229 (internal quotation marks and footnote omitted). Indeed, the Court repeatedly has held that a federal court may correct constitutional wrongs in areas generally within the purview of state lawmakers, and it has applied this principle to the area of elections. In addition to *Baker*, *supra*, *see William v. Rhodes*, 393 U.S. 23, 28 (1968) ("[The state's] claim that the political-question doctrine precludes judicial consideration of these cases requires very little discussion. That claim has been rejected in cases of this kind numerous times."); *Bond v. Floyd*, 385 U.S. 116, 130 (1966) ("The State does not claim that it should be completely free of judicial review whenever it disqualifies an elected Representative; it admits that, if a State Legislature excluded a legislator on racial or other clearly unconstitutional grounds, the federal judiciary would be justified in testing the exclusion by federal constitutional standards."); *Reynolds v. Sims*, 377 U.S. 533, 585 (1964) ("[O]nce a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are

conducted under the invalid plan."); *Wesberry v. Sanders,* 376 U.S. 1, 6-7 (1964) (noting that "nothing in the language of [the Elections Clause] gives support to a construction that would immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction"); *Gomillion v. Lightfoot,* 364 U.S. 339, 344-45 (1960) (striking down municipal boundaries that impaired voting rights and concluding that "[l]egislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution"). As we noted in *Judge II,* where state action (or, as here, inaction) infringes rights guaranteed by the federal Constitution, the federal courts have the power to hear cases and fashion remedies to redress the constitutional wrong.

B

Senator Burris next asserts that the district court usurped the constitutional role of the Illinois General Assembly when it decided how candidates should be selected for the special election and set a deadline for certifying election results. The phrase "as the legislature may direct," which concludes the second paragraph of the Seventeenth Amendment, U.S. CONST. amend. XVII, para. 2, affirms that the Amendment was not intended to disrupt the allocation of power established by the Elections Clause of the Constitution to dictate the terms of elections. *See*

U.S. CONST. art. I, § 4, cl. 1. *Judge I*, 612 F.3d at 552-54; *see also Newberry v. United States*, 256 U.S. 232, 252 (1921). Accordingly, "State law controls the timing and other procedural aspects of vacancy elections. The Elections Clause obliges the state to make these rules, and the final phrase of the Seventeenth Amendment's second paragraph reaffirms this role." *Judge I*, 612 F.3d at 554. Notwithstanding these authorities, Senator Burris maintains that the district court's order offends the Constitution.

As an initial matter, Senator Burris failed to raise this argument before the district court. And this argument, unlike the justiciability claim we discussed above, can be forfeited. A party who fails to present an argument in the trial court forfeits the position on appeal, unless we choose to entertain it "in the interests of justice." *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 391 (7th Cir. 2007). In this case, we see no reason to take this unusual step. In the district court, Senator Burris was perfectly content with the district court's power to fashion an order dictating what candidates would participate in the November 2 special election, so long as he was included among those candidates. He asked the district court to implement a signature-gathering mechanism that would allow him to earn a place on the ballot; and, when that idea failed, he encouraged the court to add him to the ballot by virtue of the fact that he was the temporary appointee. Not once in the five hearings before the injunction issued did Senator Burris argue that the district court lacked the authority to establish a slate

of candidates, and his written objections to the injunction, submitted on July 29, do not mention this point either. This court will not overturn an injunction based on an argument not presented to the district court, *Russian Media Group, LLC v. Cable America, Inc.*, 598 F.3d 302, 308-09 (7th Cir. 2010), and there is no good reason to make an exception in this case, where Senator Burris took a position in the lower court that is the opposite of the one he advances here.

Even if Senator Burris had not forfeited the argument, he would be no better off. Our previous discussion of the political-question doctrine amply demonstrates the power of the district court to fashion an equitable remedy in this case. In the face of a constitutional violation, it makes no difference that both the Elections Clause and the final phrase of the Seventeenth Amendment's second paragraph assign primary responsibility to the states for controlling the timing and other procedural aspects of vacancy elections. The same can be said of countless other areas in which, once a constitutional violation has been proven, federal courts have the power to issue remedial orders tailored to the scope of the constitutional violation. *See, e.g., American Trucking Ass'n, Inc. v. Smith,* 496 U.S. 167 (1990) (state taxation); *Hutto v. Finney,* 437 U.S. 678 (1978) (prison conditions); *Milliken v. Bradley,* 418 U.S. 717, 744-45 (1974) (school desegregation); *Swann v. Charlotte-Mecklenburg Bd. of Ed.,* 402 U.S. 1, 15 (1971) (school desegregation); *Brown v. Board of Education,* 349

U.S. 294, 299-300 (1955) (school desegregation). As Governor Quinn recently pointed out in his opposition to a stay of the district court's order in the Supreme Court, "Once the appellate court . . . determined that the Seventeenth Amendment required . . . an election, it was impossible to hold the election in the manner set forth by the Illinois legislature. In that circumstance, the district court was required to remedy the constitutional violation perceived by the Seventh Circuit, something that was unquestionably within the court's power." Memorandum of Governor Pat Quinn in Opposition at 16, *Burris v. Judge, et al.*, No. 10A272 (U.S. Sep. 17, 2010) (citing *Smith v. Robinson*, 468 U.S. 992, 1012 n.15 (1984)).

C

With respect to Senator Burris's final argument, we can be brief. Senator Burris contends that the district court's order, which was designed to remedy a violation of the Seventeenth Amendment, unconstitutionally blocks not only his access to the ballot but also that of any others who might be interested in running in the special election. In support of this argument, Senator Burris lists a number of cases where the Supreme Court has struck down ballot access restrictions as violating the Equal Protection Clause, the First Amendment guarantee of freedom of association, and the Qualifications Clause of Article I, Section 3. *See Williams v. Rhodes*, 393 U.S. 23 (1968), *Anderson v. Celebrezee*, 460 U.S. 780 (1983), and *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 1995),

respectively. But apart from alleging generally that his exclusion from the November 2 special election violates the Constitution, Senator Burris gives no indication about which provisions of the Constitution he is relying on or how his exclusion has caused the violation. We have repeatedly reminded litigants, especially those represented by counsel, that compliance with Rule of Appellate Procedure 28 requires more than "a generalized assertion of error." *Anderson v. Hardman,* 241 F.3d 544, 545 (7th Cir. 2001); *see also Haxhiu v. Mukasey,* 519 F.3d 685, 691 (7th Cir. 2008). Senator Burris's claim that he has been unconstitutionally denied access to the ballot leaves us with very little to evaluate.

For the sake of completeness, however, we observe that the Supreme Court has explained that the effect of ballot access restrictions on candidates always has a correlative effect on the field of candidates among whom voters might choose. *Anderson,* 460 U.S. at 786. When analyzing candidate restrictions, we are "'to examine in a realistic light the extent and nature of their impact on voters.'" *Id.* (quoting *Bullock v. Carter,* 405 U.S. 133, 143 (1972)). For example, restrictions pose a problem if they keep political parties off the ballot, *Williams,* 393 U.S. at 31, interfere with political expression, *Illinois Elections Bd. v. Socialist Workers Party,* 440 U.S. 173, 186 (1979), or force indigent candidates to pay fees they cannot afford, *Lubin v. Panish,* 415 U.S. 709, 718 (1974).

At the same time, however, candidacy itself is not a fundamental right, and the Court has held "that the existence of barriers to a candidate's access to the ballot 'does not of itself compel close scrutiny.'" *Clements v. Fashing*, 457 U.S. 957, 963 (1982) (quoting *Bullock*, 405 U.S. at 143). "[N]ot all restrictions imposed . . . on candidates' eligibility for the ballot impose constitutionally-suspect burdens on voters' rights to associate or to choose among candidates. . . . '[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.'" *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). In this case, two considerations lead us to the conclusion that the district court's order does not run afoul of the Court's guidance on ballot-access restrictions. First, nothing in the permanent injunction excludes a particular class or group of candidates in a manner that suggests that an identifiable group of voters will be left out of the special election. Second, and more importantly, the district court's order is narrowly tailored to address only one occasion; it will have no effect on future elections in Illinois.

As we have already noted, the district court drew on a procedure used in this circuit after *Jackson v. Ogilvie*, 426 F.2d 1333 (7th Cir. 1970), to define the mechanics of the special election required by the Constitution. Senator Burris attempts to derive a constitutional violation from the district court's effort to

balance a constitutional requirement, state election law, and the need to supply a remedy in an expeditious fashion. But far from being an additional onstitutional error, the district court's effort did nothing more or less than vindicate constitutional rights in light of the real-word consequences of the necessary relief. *See Weinberger v. Romero-Barcelo,* 456 U.S. 305, 312 (1982). The district court had discretion to limit the special election participants to names already on the general election ballot in order to avoid other problems, both constitutional and practical, that might have arisen if the special election were left wide open. *Cf. Nader v. Keith,* 385 F.3d 729 (7th Cir. 2004) (approving a district court's refusal to enter an injunction that would have interfered with an already-scheduled election). Finally, the district court's remedy, which relies on candidates selected pursuant to the Illinois Election Code, was designed to be, and probably is, the most democratic and constitutionally sound approach the district court could have devised.

III

Senator Burris has asked us to vacate the district court's permanent injunction on the ground that it is the job of the Illinois legislature, not the federal courts, to establish election procedures that ensure that the seat once held by President Obama in the U.S. Senate is filled in a manner that complies with the Seventeenth Amendment. Putting to one side

the fact that the plaintiffs brought suit to compel Governor Quinn and others to act when they refused to do so, Senator Burris now concedes that the consequence of granting him the relief he seeks is that no special election will take place at all in light of the complexity of the administrative steps needed to prepare for the election. He says this is normal, pointing to our observation in *Judge I* that nearly 15% of the almost 200 vacancies in the last century have been filed without a vote of the people. But this statistic provides no support for Senator Burris's position. To the contrary, it demonstrates that too often the requirements of the Seventeenth Amendment have been ignored. Well-established principles of equity require courts to consider, among other factors, the balance of hardship between plaintiff and defendant and the effect that the injunction would have on the public before granting equitable relief. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). In this case, the balance of hardships favors the plaintiffs, who – along with the rest of the citizens of Illinois – will see their Seventeenth Amendment rights vindicated in a special election. For Senator Burris, it means only that he will finish his temporary appointment in the Senate two months earlier than he may have expected. In an exceedingly short time, the district court considered the arguments of all sides, forged agreement between the parties, and reached a solution to bring the Illinois election machinery into line with the federal Constitution. The district court is to be congratulated for the fine job it

did, under extreme time pressure, in resolving this case.

The district court's order is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GERALD ANTHONY JUDGE, et al.,	)	Docket No. 09 C 1231
Plaintiffs,	)	
vs.	)	
PAT QUINN, et al.,	)	Chicago, Illinois June 23, 2010
Defendants.	)	2:15 o'clock p.m.

TRANSCRIPT OF PROCEEDINGS – MOTION
BEFORE THE HONORABLE JOHN F. GRADY

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* * *

[10] want two elections. You just want the one that's going to take place on November 2nd for the 112th Congress.

MR. IOPPOLO: Judge, there will be massive – the avoidance of voter confusion is an extremely important state interest, always has been recognized as such. We are going to have two ballot positions.

The other candidates are not here. I know that – I don't know whether they need to be here, but, you know, we are going to have two ballot positions, one on top of the other. Voters are going to vote for what, the 60-day term first, then the 6-year term? How do we even know who the candidates are even going to be for the 60-day term?

THE COURT: That's one of the things you have to figure out.

MR. IOPPOLO: Maybe Senator Burris wants to run for the 60-day term. Maybe independents do. We have an elaborate election code that provides how that happens. We have to have a primary election typically before we decide who gets on a general election ballot. There is no way we can do that in six months before a general election. We can't just override the Illinois Election Code by fiat. We can't do that. We can't just decide who goes on the election.

In the case of Jackson v. Ogilvie, remember, that was an empty house of representatives seat. Here you have a filled senate seat, point one distinction.

[11] Point two, the Constitution does not treat the senate vacancies in the house the same way as it treats vacancies in the senate. The governor does not have any authority to make a temporary appointment of a house seat.

THE COURT: But neither did he have authority to appoint Senator Burris to the 112th Congress.

MR. IOPPOLO: He had – well –

MR. WRIGHT: Excuse me.

MR. IOPPOLO: Well, we contend that he did. He certainly did for the duration of the term. That's what Lynch says.

THE COURT: For the duration.

MR. IOPPOLO: That's what Valenti says.

THE COURT: What do you mean by the duration of the term?

MR. IOPPOLO: Until the next election, to fill out the Obama term because there would not be time to have a replacement. I mean, Burris came in in year four or five of the six-year term.

THE COURT: Let me say this. It's obvious that I disagree with counsel for the government.

MR. WRIGHT: May I speak, your Honor?

THE COURT: Hold on just a minute.

The Seventh Circuit opinion made a lot of sense to me. There are some things we have to do to fill in the gaps [12] that were intentionally left by the Seventh Circuit. But I think that what Judge Wood said is understandable and an appropriate way to proceed. However, it's obvious that the governor is going to move for reconsideration and it's going to raise some points that may well have substance. So there's no point, in my opinion, in our trying to do

anything today. What we should do is await the results of the motion for reconsideration. What do you think?

MR. WRIGHT: I agree, your Honor, and on behalf of Senator Burris, we strongly support the position of the Attorney General. We think it's the appropriate position. There are a number of courts still open with regard to the decision from the Seventh Circuit, and we think they need to be addressed.

THE COURT: My suggestion to you all is this. Since there's going to be at least one party moving for reconsideration who may not raise all of the issues that the three of you would want to raise, I am wondering whether there is a procedure whereby you can join in the motion and ask for the court to treat the particular issue that you think needs further study. I don't know whether there is a procedure that would accommodate that or not.

For instance, Senator Burris may have arguments that Mr. Ioppolo would not – the governor, in other words, would not present on a motion for reconsideration. It might be that

* * *

[25] Amendment cases. If you recall, in that case, what the state of Pennsylvania did is to say we're going to have an election in an odd number year and the candidates will be selected by the party committees, and the plaintiff in that case took the opposite position to our case. They said you're holding the

election too soon, you're depriving us of having a primary, and the Court of Appeals of the Third Circuit said there is no requirement for a primary to fill this special election. You can have the party committees do it, and I suspect that is what happened in 1970 here in Illinois, that the party committee somehow selected these candidates. I don't know that. I think we need to find out post haste, and we may be able to inform the court, here is a mechanism that works, not costly. There may be a mechanism, for example, for the party committees, and there are other parties, the Green Party and so forth, to each designate their nominee, presumably it would be the same, and a petition requirement for anybody else who wants to run, which is, you know, the way that we sometimes solve these problems. But I think the court is absolutely right that you can't let state logistics override the constitutional mandate.

MR. IOPPOLO: The Illinois Election Code is not – somehow we may have a false dichotomy that the Constitution is always going to trump the Illinois Election Code. No. We wield the Constitution ourselves. The Constitution itself [26] says that the conduct of elections is regulated by the states.

We have a state election code that's the size of a small phone book. We cannot just make this up as we go along. We cannot deprive people of the right to vote. If this 60-day term is important enough for the people to vote on, then the people have to do it right and we have to do it right. And normally, our definition of doing it right is we do the full nine yards of

what it means to run a primary election, a general election, we have to have – independents want to get on the ballot, and maybe people in the State of Illinois want to vote for one person for the 60-day term and a different person for the six-year term. So we don't want to have a sham election where it's the same people. Who decided that by fiat, that it should be exactly the same people?

THE COURT: On page 38 of the Seventh Circuit opinion, the court talks about this question of who will be on the ballot. And they say they are not addressing the question of whose name will be on the November 2 ballot for the Obama vacancy. Then here: The state might propose a solution acceptable to all parties; for example, using the candidates who have already qualified for the election to the 112th Congress. And here is the language that is involved in your arguments: So long as that solution complies with Illinois and federal law.

Well, of course, Mr. Ioppolo is saying that that

* * *